that, to the contrary, the rule is harming competition by preventing broadcasters from achieving efficiencies that will allow them to compete more effectively with other media outlets, including video programming available via cable, DBS, home video, and video rentals, as well as other media such as radio, digital audio radio service ("DARS"), newspapers and the Internet. These commenters contend that the current rule, by focusing solely on competition among local television broadcast stations, fails to account for today's competitive media marketplace.[269] They likewise contend that in light of the broad range of media options available to the public, the rule is no longer necessary in the public interest to promote our diversity goal.[270] These commenters argue that if the rule is relaxed or repealed, single owners of multiple television broadcast outlets will have an equal or enhanced incentive and ability to offer programming that is diverse in terms of both viewpoint and program format.[271] Finally, these commenters contend that the current rule does not promote localism. Rather, they contend that the rule is harming localism by preventing combinations that would yield efficiencies that would expand local news offerings and other programming relevant to the needs and interests of viewers in local markets.[272]

139. Commenters who urge us to retain the current rule assert that relaxation of the rule will harm competition, diversity, and localism.[273] These commenters contend that competition will be harmed because non-consolidated broadcasters will face anticompetitive behavior from broadcasters who own more than one station within a local market.[274] They assert that there is a clear connection between

(Continued from previous page)

Bonneville Comments at 5; Coalition Broadcasters Comments at 11-13; Emmis Comments at 14; Fox Comments at 3-5; FMBC Comments at 1-2; Gannett Comments at 21-28; Granite Comments at 11-12; Gray Comments at 16; NAB Comments at I, 5-6; Nexstar Comments at 16, Paxson Comments at 4, Sinclair Comments at 20-21.

[269] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 1, 5; Belo Comments at 14, 25; Coalition Broadcasters Comments at 4-6; Duhamel Comments at 5-6; Emmis Comments at 31-33; Fox Comments at 3, 6; Gray Comments at 6-16; Granite Comments at 3-6, 8-10; Hearst-Argyle Reply Comments at 2-6; Media General *et al* Comments at 3-7, NAB Comments at 8-14; Nexstar Comments at 13-18; Pappas Comments at 12-14; Paxson Comments at 5-6, 29-30; Sinclair Comments at 8-19.

[270] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 5, Belo Comments at 12-19; Coalition Broadcasters Comments at 4-8; Duhamel Comments at 7, Emmis Comments at 25-30; Fox Comments at 33-34; Gray Comments at 6-15; Granite Comments at 10-11; Hearst-Argyle Reply Comments at 8-9; Media General *et al* Comments at 7, NAB Comments at 15-18; Nexstar Comments at 6-13; Pappas Comments at 12-15; Paxson Comments at 27-29; Sinclair Comments at 20-37.

[271] Alaska Comments at 6; Bear Stearns En Banc Statement at 5, Belo Comments at 22-24; Coalition Broadcasters Comments at 6-7; Duhamel Comments at 6-7; Fox Comments at 30-32; Gray Comments at 17; Granite Comments at 14; Hearst-Argyle Reply Comments at 7-8; Media General *et al* Comments at 2; NAB Comments at 36-37, Nexstar Comments at 10, 13, Pappas Comments at 14, Sinclair Comments at 16-18, 26-27.

[272] Alaska Comments at 5-6; Bear Stearns En Banc Statement at 5, Belo Comments at 12; Coalition Broadcasters Comments at 4-5; Fox Comments at 35-41; Gray Comments at 16-19; Granite Comments at 3-7; Media General *et al* Comments at 5, 7; NAB Comments at 40, Paxson Comments at 28; Sinclair Comments at 30, 54.

[273] AFL-CIO Comments at 49; AFTRA Comments at 3, 14; CFA Comments at 184; CWA Comments at ii, 16; Children Now Comments at 11-12, 18, 23; Entravision Comments at 3-8; UCC Comments at 39-41.

[274] AFL-CIO Comments at 31, AFTRA Comments at 3, 25-26; CFA Comments at 186-187. Entravision makes a similar assertion, although it does not take a position on whether to relax the local ownership rule. Entravision Comments at 6-10 Instead, Entravision proposes that we address anticompetitive conduct by establishing certain other requirements. *Id*

broadcasters to compete fairly for advertising revenue and programming. What is critical to our competition policy goals, however, is the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences. As long as there are numerous rival firms in the DVP market, viewers' interests will be advanced. We first analyze the DVP market.

(i) The DVP Market

142. The evidence in the record suggests that television viewers do not consider non-video entertainment alternatives (*e.g.*, reading and listening to music) and non-delivered video (*e.g.*, VCRs/DVDs and movie theaters) to be good substitutes for watching television.[281] In defining the market, we follow the *DOJ/FTC Merger Guidelines* and ask whether the availability of entertainment alternatives is sufficient to prevent a significant and non-transitory increase in price. If they were good substitutes to watching television, relative changes in prices or other competitive variables should change household consumption of television.[282] The record evidence suggests, however, that, while the price of subscribing to cable and DBS has increased faster than the rate of inflation, these price increases have not resulted in households dropping their subscriptions to cable and DBS,[283] or reducing the amount of time households spend watching television. In fact, the amount of time households spend watching DVP on television has remained unchanged for 30 years.[284] Thus, DVP providers have indeed been able to

[281] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www usdoj.gov/atr/hmerger/11256.htm (visited Mar 20, 2003). This approach has been referred to as the "smallest market principle."

[282] Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed Reg. 41552 (dated Apr 2, 1992, revised, Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*"). Section 1.11 of the *DOJ/FTC Merger Guidelines* states: "In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following: (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables..."

[283] Over the past several years, despite the fact that prices for MVPD service, particularly cable, have increased significantly, the percentage of households subscribing to such service also has increased. *See, 2002 Video Competition Report, supra* note 96. *See also Reports*, 1994-2001: *1994 Video Competition Report, supra* note 138, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060 (1996) (*"1995 Video Competition Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358 (1997) (*"1996 Video Competition Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998) (*"1997 Report"*), *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284 (1998) (*"1998 Video Competition Report)*, and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978 (2000) ("*1999 Video Competition Report*"); *2000 Video Competition Report, supra* note 220, *2001 Video Competition Report, supra* note 236.

[284] Adults spent 46 5 percent of their total leisure time watching television in 1970 and 46 1 percent in 2000. Harold L Vogel, ENT. INDUS ECON.. A GUIDE FOR FINANCIAL ANALYSIS (5th Ed) at 9 The 46.1 percent statistic includes time spent watching network affiliates, independent stations, basic cable programs and pay cable programs. It does not include non-delivered video such as movie theaters, video tapes, and video games

impose non-transitory price increases. This suggests that the relevant product market is no broader than DVP and should not include all entertainment activities.

143. For most viewers the programming choices offered by local broadcast television stations and cable networks represent good alternatives for one another. Most households subscribe to cable or DBS and receive DVP from cable networks and local broadcast television stations.[285] These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations. The ease of switching from broadcast to cable networks for these households provides strong incentives for cable networks and local broadcast television stations to provide programs that attract viewers. The owners of cable networks and local broadcast television stations know that anything that reduces a program's appeal will cause cable and DBS subscribers to switch to programming offered by other cable networks or broadcast stations.[286] As such, all the broadcast television stations and cable networks available to a significant number of cable subscribers in a DMA should be included as participants in the market for DVP.

144. The programming quality delivered to the minority of households that do not subscribe to cable or DBS is protected by the majority of households that do subscribe Although non-subscribing households have fewer program choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households, without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming.

145. Although viewers easily switch between the programming offered by broadcast television stations and the programming offered by cable networks, broadcast television stations and cable networks may respond differently to changes in local market concentration. Therefore, in formulating our revised local broadcast television ownership rules, we continue to draw a distinction between television broadcast stations and cable networks. Because cable networks typically offer national programming nationwide, they have incentives to respond to conditions in the national market. It is unlikely that mergers between broadcast television stations in any local market would alter the competitive strategy of a national cable network. In contrast, local broadcast television stations offer a mix of national programming and local programming in a geographic area typically no larger than a DMA. As such, local broadcast television stations have incentives to respond to conditions in local markets. It is the unilateral and coordinated responses of local broadcast television stations to mergers between local broadcast television stations that may result in potential competitive harms. Thus, we focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets.

(a) Geographic Market for DVP

146. As we evaluate the competitive effects of mergers between local broadcast television

[285] Our most recent Annual Video Competition Report found that 85 25% of all U S television households subscribe to an MVPD. *See 2002 Video Competition Report,* 17 FCC Rcd 26901 at Appendix B, Table B-1.

[286] The analytical approach of the *DOJ/FTC Merger Guidelines* "begins with a focus on consumers. Whether a proposed merger or acquisition is anticompetitive is determined in part by asking what alternatives are, or would be, available to customers in the event that prices increase or service deteriorates" Fox Comments, Owen Statement at 2-3.

stations, we must define the relevant geographic market for the DVP market. Generally, cable systems carry all the broadcast stations assigned to the DMA in which they are located, pursuant to our must-carry/retransmission consent requirements.[287] Cable systems providing service to the majority of households also carry most major cable networks. As such, the relevant geographic market for DVP is the DMA for most mergers between local broadcast television stations.

(b) Efficiencies of Common Ownership of Television Broadcast Stations in DVP Markets

147. We recognize that common ownership of stations may result in consumer welfare enhancing efficiencies. First, common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings.[288] Joint operations can eliminate redundant studio and office space, equipment, and personnel, and increase opportunities for cross-promotion and counter-programming.[289] Our current rule hinders the realization of efficiencies by prohibiting common ownership of television stations in most DMAs. To enhance the ability of broadcast television to compete with cable and DBS in more DMAs, we believe that the potential efficiencies and cost savings of multiple station ownership should be available to stations in a larger number of DMAs than permitted by our current rule.[290]

148. Common ownership of broadcast television stations in a local market may also spur the transition to digital television. The DTV transition is a government-mandated undertaking designed to achieve several important goals, including: (1) the preservation of free, universally available local broadcast television in a digital world; and (2) the promotion of spectrum efficiency and the rapid recovery of spectrum for other uses.[291] In developing DTV build-out rules for broadcast stations, the Commission has recognized the particular financial challenges faced by stations in smaller markets.[292] Nevertheless, many DTV construction costs do not vary with market size and thus it still may be

---

[287] *See* 47 C.F.R. § 76.55(b)-(e) (defining local noncommercial educational television station, local commercial television station and television market for purposes of signal carriage obligations); 47 C.F.R. § 76.56 (signal carriage obligations).

[288] Randy Falco, President of NBC Television Network, argues that broadcasters have large sunk costs in programming and ownership of multiple stations at the local level enables broadcasters to amortize programming costs across more platforms. Bear Stearns Comments at 208-09.

[289] Sinclair Comments at 16, Exhibit 8 at 30-31

[290] Alaska Comments at 3-4 Alaska contends that the current rule gives relief to large market broadcasters but denies the benefits of common ownership to small market broadcasters *See also*, Granite Comments at 14; Gray Comments at 17; and Nexstar Comments at 20-22

[291] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Broadcast Service,* 12 FCC Rcd 12809, 12811-12 ¶¶ 5-6 (1997) ("*Fifth Report and Order*").

[292] *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television,* 16 FCC Rcd 20594 (2001) (permitting stations in markets beyond the top thirty markets initially to come on the air with lower-powered – and therefore less expensive – facilities, to operate at a reduced schedule, and to file for extensions of time to construct based on financial hardship); *Fifth Report and Order,* 12 FCC Rcd at 12842 ¶ 78 (adopting staggered construction schedule to help reduce costs for smaller market stations and permit them to learn from the experience of stations in larger markets).

relatively more difficult for stations in these markets to finance the transition to DTV [293]

149. We believe that our modified rule, which permits the common ownership of at least two television stations in most markets, will have a beneficial impact on the DTV transition. One study shows that stations that are commonly owned and stations involved in joint operating arrangements are further along in the DTV transition.[294] Common ownership could facilitate cost savings by sharing DTV equipment (e.g., towers, production equipment) and engineering personnel. Common ownership would also allow the expertise gained in transitioning one station to DTV to be transferred to other commonly owned stations.

150. Our competition goal seeks to ensure that for each television market, numerous strong rivals are actively engaged in competition for viewing audiences. Although mergers among participants in the DVP market would not affect the number of delivered video program streams, they might adversely affect the types or characteristics of the programming offered by the merged entities to the detriment of viewers. Audience share data, however, reveals that common ownership of two broadcast television stations has generally improved audience ratings.[295] That is, the evidence we have for common ownership of two television stations suggests that more viewers prefer the post-merger programming. We therefore conclude that our current rule, which prohibits common ownership of broadcast television stations in most markets, is overly restrictive. Because some relaxation of the current rule to permit additional consolidation in local television markets would facilitate efficiencies and likely result in the delivery of programming preferred by viewers, we conclude that our current rule cannot be justified on grounds of competition in the market for DVP.

(ii) Video Advertising Market

151. We conclude that the current rule is not necessary to promote competition in the video advertising market. We are concerned with competition in the broadcast television advertising market only to the extent that it adds an extra level of protection to viewers and enables broadcasters to compete for advertising revenue. We conclude that our local TV ownership rule restricts many broadcasters to suboptimal size and, therefore, hinders their ability to compete with other media for advertising revenue. That said, competitive broadcast television advertising markets may require a larger number of owners of DVP than are necessary to protect competition in the DVP market. As such, assuring competition in video advertising markets may provide the public with an added level of protection. A larger number of television station owners in a local television market may also lower the potential for the exercise of market power by any one broadcaster and, therefore, help smaller or non-consolidating broadcasters compete for advertising revenue.

152 We have determined that broadcast television advertising is a relevant product market. Advertisers differ in their ability to substitute between alternative media. Although some advertisers that

---

[293] Media General *et al* Comments at 5.

[294] Coalition Broadcasters Comments, Appendix B, *Study of DTV Rollout by Smaller Stations in Markets 51-100.*

[295] *Id*, Attachment A· *Television Local Marketing Agreement and Local Duopolies Do They Generate New Competition and Diversity?* Mark R. Fratrik, BIA Financial Network (Jan. 2003). Fratrik evaluated the performance of LMA or co-ownership operations involving LIN Television and Raycom Media, and other local television stations in seven markets and determined that in all markets, these arrangements led to significant increases in both audience share and advertising revenue.

use broadcast television stations may consider cable networks or the advertising time sold by local cable operators to be good substitutes, other advertisers may not consider these alternatives to be good substitutes.[296] In addition, most advertisers that use broadcast television stations do not consider radio, newspapers, and other non-video delivery media to be good substitutes.[297] We disagree with studies suggesting that broadcast television is not a relevant product market.[298] A critical failing of these studies is the assumption that any exercise of market power would result in a general and uniform price increase to all advertisers. These studies argue that a significant number of advertisers have good substitutes for broadcast television and could defeat a general and uniform price increase. These studies fail to recognize that media markets are characterized by repeated interaction that enables broadcasters to identify advertisers that have good substitutes for broadcast television and those that do not have good substitutes for broadcast television. With this information, the exercise of market power in broadcast television markets would result in targeted and non-uniform price increases to those advertisers that do not have good substitutes for broadcast television, without raising prices for those advertisers that do have good substitutes for broadcast television.[299]

---

[296] David Barrett, President and Chief Executive Officer of Hearst-Argyle Television, Inc., argues that over-the-air television stations have the most popular programs and can aggregate the largest audience. When it comes to attracting advertisers, Mr Barrett maintains that broadcast television stations have absolute advantages over niche boutique cable network offerings. Bear Stearns Comments at 26

[297] MOWG Study No. 10, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* by Anthony C. Bush (Sept. 2002) ("MOWG Study No. 10") (finding weak substitutability between local television and local radio and weak substitutability between local television and local newspapers); Fox Comments, Owen Statement at 12 (asserting that merger enforcement in the media has tended to focus on rather narrow advertising markets, that DOJ excludes television and newspaper advertising as alternatives to radio when considering the advertising market definition in radio station mergers, and that DOJ has similarly rejected television and radio advertising as alternatives for newspaper advertisers when considering newspaper mergers); IPI Comments, Appendix A (finding no responsiveness of local cable television advertising rates to changes in local broadcast television advertising rates). The findings of IPI's study suggest that cable may have market power over some local advertisers IPI's study does not, however, address the issue of whether consolidation of broadcast television stations in a local market could have market power *See also* Bear Stearns Comments at 88-89 (Jeff Smulyan, Chairman, Emmis Corporation asserts that the audience most targeted by advertisers (18 to 34 year-olds and 18 to 49-year olds) are not reading daily newspapers anymore, which gives broadcast television an advantage).

[298] Crandall contends that his results suggest that television broadcast is not its own product market. Sinclair Comments, Exhibit 1, *The Economic Impact of Providing Service to Multiple Local Broadcast Stations Within a Single Geographic Market*, Robert W Crandall, at 23 ("Sinclair Comments, Crandall Statement"). Baumann and McAnneny contend that the relevant product market is broader than broadcast television advertising and includes cable television, radio, newspaper, outdoor, and direct mail. Sinclair Comments, Exhibit 8, *Analysis of the Competitive Effects of an LMA between WTTE-TB and WSYX-TV in Columbus, Ohio*, Michael G. Baumann and Joseph W. McAnneny (Aug. 28, 1997) at 20 ("Sinclair Comments, Baumann/McAnneny Statement").

[299] Sinclair Comments, Baumann/McAnneny Statement at 28-30 Baumann and McAnneny maintain that price discrimination is unlikely because: (1) broadcasters would have to make educated guesses to identify price-insensitive advertisers, (2) advertisers that consider broadcast television an essential outlet have an incentive to disguise their preferences, and (3) advertisers could use media buyers and advertising agency representatives that are able to compare rates and resist attempts to charge greatly disparate rates for similar spots. *Id* Baumann and McAnneny do not explain how hiring an advertising agency prevents price discrimination We are not persuaded Broadcasters make repeated sales, have a keen understanding of the price-sensitivities of advertisers, and can (continued)

153. Our experience suggests, however, that common ownership of two local broadcast television stations has produced efficiencies without facilitating the exercise of market power in the broadcast television advertising market. Two studies in the record evaluate the impact of consolidation on advertising prices. One study indicates that local broadcast advertising prices are not significantly higher for stations owned or operated by single entity.[300] Another study examines market structure in the Columbus, Ohio, DMA following a broadcast television local marketing agreement ("LMA")[301] combination in the market and concludes that the LMA is unlikely to result in any competitive harm to local advertisers.[302] The data for these studies were based on the common operation of two broadcast television stations in the same market. In light of this evidence, and evidence cited above that the current rule prohibits some consumer welfare enhancing combinations, we conclude that the current rule is overly restrictive and not necessary to protect competition in the broadcast television advertising market.

(iii) Video Program Production Market

154. We conclude that the current rule is not needed to protect competition in the video program production market. Broadcast television stations, along with TV networks, cable networks, program syndicators, and cable and DBS operators purchase or barter for video programming. The channel capacity of today's cable operators and DBS operators provides many more opportunities for sellers of existing and new video programming, compared with 20 years ago.[303] Many of the programs sold today are specifically targeted to the niche audiences available on cable networks. In addition, many video programs initially sold to TV networks migrate to cable networks, and a few programs initially sold to cable networks migrate to local broadcast television stations. Same-market combinations are only of concern to the few program syndicators that sell their programming directly to individual local television stations. These program syndicators would not consider sales to group owners of television stations in multiple markets, TV networks, and cable networks to be good substitutes for the sale of programming to individual stations. These program syndicators play one television broadcast station against another in the same market to sell their programming. By precluding common ownership of broadcast television stations in most markets, our current rule provides for more owners of television broadcast stations in most markets than are necessary to assure that program syndicators receive a fair price for their programming.[304] We conclude, therefore, that the current rule is not necessary to protect competition in the video program production market.

(Continued from previous page)
identify advertisers that consider television an essential buy. We conclude that a broadcaster with market power could raise prices to these advertisers.

[300] Sinclair Comments, Crandall Statement at 27. Using data from Sinclair, Crandall performs an econometric analysis of 58 stations in 38 DMAs

[301] An LMA or a time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming. *See Local TV Ownership Report and Order*, 14 FCC Rcd at 12958 ¶ 126, 47 C F.R. § 73.3555, Note 2(j) (2002).

[302] Sinclair Comments, Baumann/McAnneny Statement at 2.

[303] *See supra* ¶¶ 106-128

[304] The current rule ensures that there are at least eight independent owners in all markets with eight or more stations.

b. Localism

155. The adoption of the local TV ownership rule was not predicated on promoting localism. To the contrary, the Commission has previously recognized that relaxation of the rule was likely to promote localism. Specifically, we relaxed the local TV ownership rule in 1999 on grounds that local ownership combinations were likely to yield efficiencies that "can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest."[305] The primary evidence of "programming and service" benefits was anecdotal evidence of increases in the amount of local news and public affairs programming aired by stations participating in LMAs.[306]

156 The *Notice* requested comment on whether and how the local TV ownership rule affects localism.[307] We asked whether the rule affects the quantity or quality of local news and other programming of local interest produced and aired by local stations, and whether it affects the local selection of news content that is aired.[308] We sought empirical data on the impact that common ownership and operation has had on the production of local programming by stations involved in such combinations or arrangements, and data on the quality of such programming.[309] We also sought comment on the costs of producing local news and public affairs programming, and the relationship of our local TV ownership rule to the viability of such programming.[310] Below, we analyze the relationship of the current rule to our policy goal of promoting localism, and examine whether modification of the rule will advance this policy goal. We conclude that our current local TV ownership rule poses a potential threat to local programming, and that modification of the rule is likely to result in efficiencies that will better enable local television stations to acquire content desired by their local audiences.

(i) Local Programming Quantity and Quality

157. Commenters advocating relaxation of the local TV ownership rule contend that if the current rule has any relationship to localism, it is to hinder the achievement of this policy goal.[311] According to these commenters, the current financial position of many television broadcasters and the high cost of producing local news and public affairs programming threatens existing local programming and precludes development of new programming.[312] These commenters contend that the current rule

[305] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12920 ¶ 34

[306] *Id.* at 12921-22 ¶ 36, n 68 Most of the record evidence of the potential benefits was anecdotal and was presented by broadcasters based on their own experiences with LMAs.

[307] *Notice*, 17 FCC Rcd at 18535 ¶ 95.

[308] *Id.*

[309] *Id.* at 18535 ¶ 95-96

[310] *Id.* at 18535 ¶ 97

[311] Sinclair Comments at 29-31; Media General *et al* Comments at 5, Duhamel Comments at 5-6. Several commenters state that our localism policy is unrelated to ownership rules. They contend that localism is an obligation of all broadcast licensees that is enforced through our licensing and license renewal processes. *See* Nexstar Comments at 18-20; Gray Comments at 16; Sinclair Comments at 30-31

[312] Alaska Comments at 6; Belo Comments at 25, Coalition Broadcasters Comments at 4-7; Granite Comments at 6-7; Gray Comments at 16-18; NAB Comments at 75-77.

prohibits combinations that would result in efficiencies which would facilitate production of more local news and public affairs programming, or at least protect current local news operations.[313] In support of these arguments, commenters provide persuasive anecdotal and empirical evidence of how LMA and duopoly combinations have improved local coverage,[314] and some evidence of the rising costs of local news operations.[315]

158. On the other hand, commenters opposing modification of the rule assert that concentration within local markets impedes localism, as evidenced by sharing of news resources and one case of reduced local news offerings following the establishment of a same-market television combination. Some of these commenters anticipate that modification of the local television ownership rule will lead to television programming that is less responsive to local needs based on their observations of how radio consolidation has affected local programming.[316] In support of their contentions, these commenters provide examples of how combinations have harmed local news and public affairs programming.[317] The few examples provided, however—especially those that are borrowed from the newspaper or radio contexts—do not persuade us that local combinations of television stations will harm localism.

(a) Empirical Evidence

159. An empirical study of the effects of common ownership or operation on local news quantity and quality provides some evidence that stations that are commonly owned or operated are more likely to offer local news than independently owned stations. The study submitted by Fox ("News Study") examined the news offerings of all full-power commercial television broadcast stations, comparing the quantity and quality of local news offerings of stations that are part of a commonly owned/operated pair with those of other stations.[318] The News Study found that stations that are part of a commonly owned local station group or LMA are significantly more likely to carry local news than other stations, even controlling for other factors. The study also found that the total minutes of local news

---

[313] Alaska Comments at 5-6; Coalition Broadcasters Comments at 4; Duhamel Comments at 6; Granite Comments at 7, Gray Comments at 15-16, Hearst-Argyle Comments at 8-9; Media General, *et al* Comments at 5, NAB Comments at 78

[314] Belo Comments at 22-24; Coalition Broadcasters Comments at 16-33; Fox Comments, Economic Study B, *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality* (*"Fox News Study"*); Nexstar Comments at 2-6.

[315] NAB Comments, Attachment D, *Newsroom Budgets in Midsize and Small Markets*, prepared for NAB by Smith Geiger, LLC (*"NAB Newsroom Costs Study"*); NAB Comments, Attachment C, *The Declining Financial Position of Television Stations in Small and Medium Markets* ("NAB Comments, Small to Medium Markets Statement")

[316] AFL-CIO Comments at 27-30, AFTRA Comments at 12-14, 33-35; CFA Comments at 250-260; CWA Comments at 29, 32, 40-42, UCC Comments at 16, 51-52.

[317] Although they offered anecdotal evidence, commenters who urge us to retain the current rule did not provide empirical data concerning the effects of same-market local TV combinations on local news and public affairs programming. PEJ provided an empirical study that analyzed the effects on local news of the following factors: size of a station group (*i e*, across all markets), network affiliation, cross-ownership of other media, or ownership by an entity with corporate headquarters in the market. Thus, the study did not analyze the effects on local news of common ownership of more than one television station in a market.

[318] *Fox News Study* at 3

carried by commonly owned or operated stations is similar to the total minutes of local news carried by other stations, as is the quality of the news programming as measured by the number of news awards the stations receive. The study considered whether stations that compete with same-market combinations increase or reduce the amount of local news they air in response to the presence of the same-market combination, and found that the presence of a combination had no statistically significant effect on the amount or quality of news programming available in the DMA, after controlling for other factors.[319]

(b) Anecdotal Evidence

160. Broadcasters provide persuasive anecdotal evidence in support of their claims that same-market combinations have resulted in efficiencies that produce public interest benefits. Belo states that its acquisition of a second station in the Seattle, Washington, DMA has resulted in an extra hour of news programming,[320] and has allowed Belo to devote more resources to public affairs programming.[321] Belo's second station in Spokane, Washington, recently began airing local news,[322] and a recently acquired second station in Tucson, Arizona, will soon begin to air a local newscast.[323] Nexstar states that local news and public affairs programming has increased as a result of its LMAs in various markets,[324] including, for example, tripling the news coverage in Bloomington, Illinois, from one crew to three crews;[325] starting the market's only 9.00 PM newscast;[326] reinstating local sports programming;[327] and producing and airing a new local public affairs program.[328]

161. Coalition Broadcasters point to similar public interest benefits resulting from their same-market combinations.[329] At one station that is part of an LMA, efficiencies allowed for an increase in the number of employees devoted to producing news and the expansion of the station's local news from six hours per week in 1994 to 19.5 hours per week today.[330] Another station did not offer any regular local

[319] *Id* at 2.

[320] Belo Comments at 22-23. The stations share news staff but have separate news producers.

[321] *Id*

[322] *Id* at 23 Although the news is co-produced with its duopoly pair, the station airs its news at a different time and has its own anchor and news producer. *Id*

[323] *Id*

[324] Nexstar Comments at Appendix A (describing public interest benefits resulting from combinations in nine markets).

[325] *Id* at A-1.

[326] *Id* (describing changes resulting from an LMA in the Peoria-Bloomington, Illinois DMA).

[327] *Id* (describing changes resulting from an LMA in the Joplin, Missouri-Pittsburg, Kansas DMA)

[328] *Id* at A-2 (describing changes resulting from an LMA in the Wilkes Barre-Scranton, Pennsylvania DMA).

[329] Coalition Broadcasters Comments at 16-34 (describing public interest benefits resulting from seven combinations)

[330] *Id.* at 16 (describing an LMA in the Fort Myers-Naples, Florida DMA)

news or sports coverage and provided little other local program service prior to entering into an LMA, which later became a duopoly.[331] Today, the station broadcasts approximately 120 local university sports events annually, 60-second news briefs twice daily, five minute news briefs during university games, and a rebroadcast of the news of its LMA partner at a different hour.[332] The station also has aired 21 locally-produced evening specials over the past two years.[333] Operating independently, the local programming offerings of two UHF stations in Cleveland, Ohio, were scant – one hour of local news on one of the stations, and no local news on the other.[334] The stations then entered into an LMA and later became a duopoly.[335] Today, one station airs 7.5 hours of local news coverage every weekday, and the other offers one hour of news per day, as well as news breaks [336] Fox reports that the 1999 relaxation of the local TV ownership rule allowed it to create nine combinations, which are airing an average of 6% more local news than before Fox acquired these stations.[337]

162. In support of their contention that relaxation of the local TV ownership rule has adversely affected localism, AFL-CIO and AFTRA state that "examples of the loss of local newscasts . . . as a result of media consolidation abound nationwide" but provide only three examples, two of which concern radio combinations.[338] Specifically, they state that Sinclair has announced plans to cease local production of weather reports at its two television broadcast stations in the Dayton, Ohio, DMA which now will air weather reports generated at Sinclair's Baltimore, Maryland, headquarters [339] As these commenters recognize, Sinclair stations that are not part of combinations also will receive weather reports from corporate headquarters, so this evidence does not demonstrate that consolidation within local markets decreases local origination of weather reports or otherwise reduces local programming.[340]

[331] *Id* at 18 (describing a combination in the Honolulu, Hawaii DMA).

[332] *Id* at 18-20

[333] *Id*

[334] *Id* at 21.

[335] *Id*

[336] *Id* Both stations have access to significantly improved resources and facilities for news production. Prior to the combination, the station offering news had seven videographers, 25 other staff, and a single news truck. Today, the stations boast a combined news division of 19 videographers, 73 other staff, four news trucks, sixteen cars, a helicopter, six ENG microwaves and five receive sites. *Id* at 21-34 (describing similar public interest benefits resulting from combinations in several other markets); *See also* Statement of Edward Munson, Vice President and General Manager of WAVY(TV) and WVBT(TV) at FCC Field Hearing on Media Ownership, Feb 27, 2002 ("LIN En Banc Statement") (describing similar public interest benefits resulting from a combination in the Richmond, Virginia DMA).

[337] Fox Comments, News Programming Exhibit 1 at 3-4 Fox states that in each case, it has owned the second station for 16 months or less. *Id*

[338] AFL-CIO Comments at 47-49; AFTRA Comments ¶¶ 32-40.

[339] AFL-CIO Comments at 48, AFTRA Comments ¶¶ 32-40.

[340] Sinclair Reply Comments at 12 (as evidenced by its use of NewsCentral in markets in which it owns only one station, Sinclair's NewsCentral initiative has "nothing to do with duopoly").

Rather, production of programming at a national headquarters appears to be motivated by the ability to achieve efficiencies unrelated to the number of stations Sinclair owns within a particular local market.[341] AFL-CIO and AFTRA also state that when Viacom acquired a second all-news radio station in Chicago, it shut down one of the stations, eliminating a source of local news.[342] Viacom refutes this claim, asserting that the station was not "shut down" but that its format was changed from all news to sports/talk in order to meet the desires of local audiences.[343] We do not agree that a change in format is the same as "shutting down" a station. We also do not agree that a single example of a radio station's format change can be extrapolated into a general statement about the effects of our existing local TV rule, or a predictive statement about the likely result of modifying the rule.

163. UCC believes that the increased common ownership of stations in the same market has reduced the amount of local programming because co-owned stations consolidate staff and resources that produce local information.[344] UCC complains that, as a result of the 1999 relaxation of the local TV ownership rule, there are now at least 75 commonly owned station pairs and 20 station pairs that are part of LMAs[345] UCC provides examples of two markets where commonly owned stations share resources,[346] and one market where a combination that once shared news resources ceased to produce local news entirely, relying on news produced by another station in the market.[347] The effects of same-market combinations on news production in just three markets are not a sufficient basis for a conclusion about the effects of some 95 same-market combinations on localism. Moreover, although the examples provided show that the subject stations no longer produce news independently, this does not necessarily translate into "less" local news.[348] The subject stations may now offer the same news at different times, which might actually expand the "amount" of news available to viewers in that market, if viewers previously unable to watch news programming can watch the news at a different time.[349] By combining resources, the subject stations may also be offering more coverage of local events than before. UCC's

[341] Sinclair states that its NewsCentral initiative, pursuant to which it produces news from a central location, is "intended to allow Sinclair to produce and broadcast news in a more efficient manner than is currently the case," and is not relevant to the instant proceeding *Id* at 6

[342] AFL-CIO Comments at 48-49, AFTRA Comments ¶¶ 32-40.

[343] Viacom Reply Comments at 5-6

[344] UCC Comments at 39-40.

[345] *Id.*

[346] *Id* at 40 (discussing the combined operations of two stations owned by Viacom in New York, New York and two stations owned by Fox in Los Angeles, California)

[347] *Id.* (describing a Detroit, Michigan combination owned by Viacom that now obtains news from a competitor)

[348] The production of local news by more owners relates to viewpoint diversity, not localism.

[349] According to Belo, broadcasters owning or operating same-market combinations have "strong economic incentives" to add news programming to commonly owned stations At a minimum, such broadcasters would repurpose newscasts at staggered times to increase audience share, thereby bringing local audiences more viewing opportunities. Belo Comments at 24-25. Coalition Broadcasters assert that "even the limited consolidation achieved through existing LMAs and duopolies has enabled in-market stations to offer beneficial services such as local news and public affairs programming and other innovative services." *See* Coalition Broadcasters Comments at 6-7.

anecdotal evidence does not address these factors.

(c) **Conclusion**

164. On balance, evidence presented by commenters concerning the amount and quality of local news and public affairs programming suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do. Thus, modifications to the rule that will allow for greater common ownership are likely to advance our localism goal.

(ii) **Effect of Local Market Consolidation on Local Control Over Content**

165. Without linking their conclusions to a specific rule, AFL-CIO and AFTRA contend that media consolidation generally reduces local control over content and places greater control in the hands of the corporate headquarters of the entity that owns a given outlet.[350] They further state that by reducing the number of available employers at the local level, consolidation makes news professionals less likely to risk alienating their employers by challenging their demands.[351] In support of this, AFL-CIO and AFTRA cite their own experience in contract negotiations, which they contend are conducted by corporate, not local station representatives. They do not, however, provide any examples of negotiations, nor do they offer a comparison between negotiations with employers that own more than one station in a market and those that own single stations.[352] They state that because of a directive from a Disney CEO, the ABC network cancelled a story on Disney's hiring policies.[353] However, this example does not pertain to programming decisions of local stations, but to the programming decision of a national broadcast network. Such evidence may be relevant to whether there is a tie between ownership and the presentation of viewpoints, but does not establish a connection between local market structure and local control over content. Indeed, we have no record evidence linking relaxation of our local ownership rule to a reduction in local control over content.[354] We also have no means of measuring the extent to which news professionals' fear of retribution by their employers is reducing the ability of television broadcast stations to offer news focused on the needs and interests of their local communities, nor can we connect such concerns to our local ownership rules.

---

[350] AFL-CIO Comments at 51-53; AFTRA Comments ¶¶ 46-51.

[351] AFL-CIO Comments at 53; AFTRA Comments ¶ 52 They also cite a recent study showing that 41% of 300 reporters surveyed said that they had intentionally avoided newsworthy stories to benefit the corporate interests of their news organizations AFL-CIO Comments at 52; AFTRA Comments ¶ 50 (citing Pew Research Center for People and the Press Survey (Apr. 30, 2002)). Again, such comments and findings help to establish a connection between viewpoint diversity and ownership, but they do not tell us whether the local TV ownership rule is in any way linked to journalists' reporting decisions. Commenters do not contend, nor does the cited survey find, that such results are any more or less likely in when there is greater local market concentration

[352] AFL-CIO Comments at 51-52; AFTRA Comments ¶ 47.

[353] AFL-CIO Comments at 52; AFTRA Comments ¶ 48.

[354] Nexstar asserts that, contrary to the unsubstantiated claims of some commenters, they "actively mandate a local community focus for their stations " Nexstar Reply Comments at 6.

(iii) News Programming Costs and Viability of Local News Operations

166. Several commenters contend that the rising cost of producing news and public affairs programming is forcing broadcasters to reduce news production and that relaxation of the local TV ownership rule would allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing programming.[355] Gray provides four examples of stations in smaller markets that have shut down or significantly scaled back their news operations due to financial concerns.[356]

167. NAB filed a study conducted by Smith Geiger, LLC ("Smith Geiger") examining the cost of the startup and operating costs of local news production for stations in small (ranked 101-210) and mid-sized (ranked 51-100) markets.[357] The study provides an average operating budget and the average startup costs for a small market station and for a mid-size market station, intended to reflect newsrooms that are neither "heavily invested" nor "financially starved."[358] The study finds that although equipment prices are dropping rapidly, rising demand for qualified personnel is increasing the amount stations must spend on salary and benefits.[359] Smith Geiger concludes that a startup news operation would not "break even" until year 13 in a small market and year 14 in a mid-sized market.[360] The study concludes that in this climate, if a local station were to cease news operations, "it is difficult to imagine another entity stepping in to take its place."[361] Smith Geiger notes that although news operations earn a profit,[362] they require the parent company or station to carry a significant cost load and deal with other intangibles such as personnel management, liability, and community goodwill.[363] Smith Geiger concludes that this may lead local stations to exit the local news business in favor of lower cost alternatives, such as acquired programming, which it estimates will earn a higher profit in both small and mid-sized markets.[364] Smith Geiger ultimately concludes that "the continuing profitability of a local television news operation is now highly uncertain."[365] Many commenters agree.[366] NAB submitted an additional study which compares

[355] Gray Comments at 17-19; Duhamel Comments at 5-6; Granite Comments at 6-7, 11-12; NAB Comments at 75-78, Nexstar Reply Comments at 11-12.

[356] Gray Comments at 18-19 Similarly, Granite contends that "local" news is not so local anymore because financial pressures have forced broadcasters to take cost-cutting measures such as filling local newscasts with regional and national feeds Granite Comments at 7.

[357] *NAB Newsroom Costs Study*, *supra* note 315

[358] To determine the costs, Smith Geiger states that it polled multiple stations in each market range, but it does not specify how many stations were polled, how the stations were selected, or its polling methodology. *Id.* at 2.

[359] *Id*

[360] *Id.* at 6, 11.

[361] *Id* at 15.

[362] Smith Geiger finds that existing news operations in mid-sized markets earn a 40% profit margin, and that news operations in small markets earn a 30% profit margin. *Id.* at 13.

[363] *Id.*

[364] *Id* at 13-15

[365] *Id.* at 2.

the average cost of producing news by affiliates of "Big Four" networks (*i.e.*, ABC, CBS, Fox, and NBC) in markets of various sizes.[367] These data show that the average news expense of affiliate stations has increased by as much as 104% between 1993 and 2001.[368]

168. Smith Geiger does not provide detailed information on how it gathered its data, how many stations were sampled, or how the stations were selected. The study data may have been gathered from hundreds of stations or a mere handful. However, NAB's other study concerning the costs of producing news, which describes its methodology and surveys a broad range of stations, supports the conclusion that news costs are rising. Moreover, there is no contrary evidence in the record to suggest that the cost of producing news and public affairs programming is decreasing. We also recognize that certain factors, such as declines in network compensation[369] and the costs of transitioning to DTV,[370] are likely to place some broadcasters under financial pressures which could cause them to choose a less expensive option than producing their own local programming.

169. *Conclusion.* The current local TV ownership rule is not necessary in the public interest to promote localism. More likely, the current rule is hindering our efforts to promote localism. Anecdotal and empirical evidence in the record demonstrates post-combination increases in the amount of local news and public affairs programming offered by commonly owned stations. Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options. Having found that there is a positive correlation between same-market combinations and the offering of local news, we agree with NAB and others who contend that modifying the local TV rule is likely to yield efficiencies that will allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing local programming.

c. Diversity

170. Section 202(h) requires that we consider whether the local TV ownership rule is necessary in the public interest to promote our diversity goal. Our current rule measures viewpoint diversity largely through its voice test, which ensures that all television markets have at least eight independent broadcast television voices. The *Sinclair* court remanded the Commission's decision in the *Local TV Ownership Report and Order* on grounds that we failed to adequately explain why only television broadcast stations are relevant to our diversity analysis for purposes of our local TV rule, when several other kinds of media were deemed relevant to our diversity analysis for purposes of other rules. Accordingly, we also sought comment on whether additional media should be considered in evaluating diversity in local television markets. The *Notice* also sought comment on the extent to which local

(Continued from previous page)
[366] Alaska Comments at 5-6, Bear Stearns Comments at 5; Gray Comments at 16-19; Granite Comments at 12-14; NAB Comments at 75-78.

[367] NAB Comments, Small to Medium Markets Statement, *supra* note 315.

[368] *Id.* Specifically, the study shows that between 1993 and 2001, the average increase for stations in markets 51-75 was 71%; in markets 76-100, 104%; in markets 101-125, 58%; in markets 126-150, 56%; and in markets 151-175, 82%

[369] Alaska Comments at 5-6, Granite Comments at 12, NAB Comments at 74.

[370] Alaska Comments at 5-6; Bear Stearns En Banc Statement at 3; Gray Comments at 18; Granite Comments at 12; NAB Comments at 72-75 *See also* ¶¶ 148-149, *supra.*

television stations express viewpoints, and whether there is a connection between ownership and viewpoint.

171. As discussed in the Policy Goals Section, we find that, as we have previously held, multiple media owners are more likely to present divergent viewpoints.[371] Upon review of the record in this proceeding as well as our own analysis of local media markets, we find that media other than television broadcast stations contribute to viewpoint diversity in local markets. The data in the record indicate that the majority of markets have an abundance of viewpoint diversity. We conclude therefore that our existing local TV ownership rule is not necessary to achieve our diversity goal. In order to promote viewpoint diversity, we will rely on a combination of our cross media limits, discussed below at Section VI.D., as well as revised local television and local radio ownership caps.

172. Although our local TV ownership rule was not intended to promote program diversity, our *Notice* also sought comment on the relationship between our local TV ownership rule and program diversity. We also conclude that the current rule is not necessary to promote program diversity.

(i) Viewpoint Diversity

173. Proponents of relaxing the rule contend that owners of television stations do not present their own viewpoints,[372] that each television station presents multiple viewpoints,[373] that a single owner of more than one television station in a market has greater economic incentives to present a broader diversity of viewpoints in order to attract more viewers,[374] and that under the current rule, television stations avoid presenting extreme views in order to avoid alienating viewers.[375] Several commenters contend that the current rule actually poses a threat to viewpoint diversity.[376] Duhamel asserts that in today's economic climate, if broadcasters cannot consolidate within local markets, stations will go dark, resulting in greatest possible harm to diversity.[377]

---

[371] *See* Policy Goals, Section III, *supra.*

[372] Belo Comments at 14-16, 17-19; Duhamel Comments at 7; Granite Comments at 10-11; Sinclair Comments at 50-52, Exhibit 24, Belo Reply Comments at 3-5.

[373] Granite contends that every station presents multiple viewpoints, citing, among other things, political broadcasting requirements that ensure that stations serve "as a megaphone for all candidates, not just those with whom the broadcaster agrees." Granite Comments at 10-11. *See also* Statement of Jay Ireland, President, NBC Stations at FCC Field Hearing on Media Ownership (Feb 27, 2003)at 4 ("NBC En Banc Statement")

[374] Fox Comments at 51-52 (a single owner of multiple outlets has a greater incentive to provide viewpoint diversity than would multiple owners); NAB Comments at 32-35; Nexstar Comments at 8-9 (viewpoint diversity will not be reduced but increased, as demonstrated by the maintenance of separate news staffs and different news content by LMA combinations operated by Nexstar and Quorum); Paxson Comments at 7-8; 28 (market forces will promote diversity goals), Sinclair Comments at 26-28, Exhibit 16 (common ownership or operation has increased viewpoint diversity in some cases, as evidenced by certain Sinclair duopolies/LMAs)

[375] Granite Comments at 10-11, Belo Comments at 14-16

[376] Duhamel Comments at 7. *See also* Coalition Broadcasters at 6 (combinations promote diversity by ensuring the viability of local broadcasters that might otherwise go dark)

[377] Duhamel Comments at 7

174. We recognize that a single media owner may elect to present a range of different perspectives on a particular political or social issue. It may also be accurate that, as several commenters contend, a single owner of multiple media outlets in a local market may have a greater incentive to appeal to more viewers by presenting more perspectives than do multiple owners of single outlets. Even if a single owner of multiple television stations in the same market has an enhanced ability and incentive to present a broader range of viewpoints, that single owner still retains "ultimate control over programming content, who is hired to make programming decisions, what news stories are covered, and how they are covered."[378] We conclude that we cannot rely exclusively on the economic incentives that may or may not be created by ownership of multiple television stations to ensure viewpoint diversity. However, as we discuss further below, because we find that other media contribute to viewpoint diversity in local markets, we conclude that our existing local TV ownership rule is not necessary to achieve our diversity goal.

175. *Contribution of Other Media to Viewpoint Diversity in Local Markets.* The local television ownership rule has traditionally focused only on the contribution of television broadcast stations to diversity in local markets. In the 1998 Biennial Review proceeding, the Commission sought comment on media substitutability, but was "unable to conclude from the record the extent to which other media serve as readily available substitutes for broadcast television." Lacking adequate factual information concerning the contribution of other media to competition and diversity in local markets, the Commission established a voice test that included only full power television broadcast stations.

176. The *Notice* sought comment on whether, and if so how, to apply a voice test as part of our local television ownership rule. The *Notice* asked whether additional media such as radio stations, daily newspapers, cable systems, DBS, and DARS should count towards any voice test adopted as part of a local TV ownership rule.[379] Stated differently, the *Notice* sought comment on what media contribute to viewpoint diversity in local markets. Based on the evidence in the record, including our own evaluation of the media marketplace, we find that media outlets other than television stations contribute significantly to viewpoint diversity in local markets, and that our current rule fails to account for this diversity.

177. All of the commenters proposing modification or elimination of the local TV ownership rule argue that there is today an abundance of viewpoint diversity, and that even if the local TV ownership rule is relaxed or eliminated, the market will ensure continued availability of viewpoint and other types of diversity.[380] These commenters contend that, given current levels of diversity in local markets, the Commission cannot justify its current local TV ownership rule on diversity grounds.[381] Commenters further assert that the current rule inappropriately and incorrectly focuses only on television

[378] UCC Comments at 3-4. *See also* CWA Comments at 28-32, 42-45.

[379] *Notice,* 17 FCC Rcd at 18528-29 ¶ 77.

[380] Nexstar Comments at 6-13, Paxson Comments at 28 (asserting that the market and public demand has produced a great diversity of voices, and there is no incentive for large station group owners to "descend upon communities and extinguish the diversity," nor any evidence of an ability or intention to do so); Gray Reply Comments at 4-5, Paxson Reply Comments at 3; NBC En Banc Statement at 4

[381] Alaska Comments at 4-5, Belo Comments at 21-22; Duhamel Comments at 6-7; Fox Comments at 44-47; Granite Comments at 10-11; Gray Comments at 14-15; NAB Comments at 35-39, 44; Nexstar Comments at 8-9, Paxson Comments at 27-30, Sinclair Comments at 22-25.

voices, when other media voices clearly contribute to diversity in local markets.[382] Commenters also state that programming other than local news may contribute to viewpoint diversity, and that such programming should be considered in measuring viewpoint diversity.[383]

178. We agree that television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets. The market for viewpoint and the expression of ideas is, therefore, much broader than the economic markets, defined above, in which broadcast stations compete. In particular, in focusing on the delivered video market alone, we would ignore countless other sources of news and information available to the public.[384] As a corollary, however, limits imposed on television station combinations designed to protect competition in local delivered video markets necessarily also protect diversity; indeed they are more protective of competition in the broader marketplace of ideas given the difference in market definition.

179 We do not, therefore, necessarily disagree with those who maintain that a local television ownership cap can help to protect the public's First Amendment interest in a robust marketplace of ideas.[385] We disagree, however, to the extent that they advocate a diversity-based rule that looks to broadcast-only television voices.[386] Accepting this narrowly-defined view would result in a rule that is

[382] Alaska Comments at 4-5; Belo Comments at 19-22 (daily newspapers, news/talk radio stations, cable news and public affairs programming, weekly newspapers and magazines, and Internet sources contribute to viewpoint diversity even more than television stations), Emmis Comments at 26-30; Fox Comments at 6-10, 50; Gray Comments at 14-15 (viewpoint diversity is guaranteed by availability of news and information from numerous radio and television stations, hundreds of video programming services, MVPDs, daily and weekly newspapers, thousands of periodicals, millions of web sites, and wireless data services); NAB Comments at 32; Pappas Comments at 15, Paxson Comments at 27-28; Sinclair Comments at 25-28 Gray counts low power television ("LPTV") stations among the voices contributing to diversity in markets served by its stations. Gray Comments at 10-13. *See also* IPI Comments at 19-20, 24-27 (urging us to consider the role of LPTV stations because LPTV stations may serve as substitutes for other local media for certain consumers and advertisers), Louisville Communications Reply Comments at 2-6; at 2. *See* Letter from Howard M Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H. Dortch, Secretary, FCC (May 16, 2003) at 2-3 ("Nexstar May 16, 2003 Ex Parte").

[383] Fox Comments at 50-51. *See also* Sinclair Comments at 21, 34-38 (if viewpoint diversity means something more than local news, the Commission also should factor in all programming that contributes to an awareness of political and social issues, including national news, non-traditional news, and certain entertainment programming); *but see* NAB Comments at 39-40 (most television and radio programming is entertainment-oriented and does present viewpoints).

[384] *See* MOWG Study No. 8, *Consumer Survey on Media Usage* by Nielsen Media Research (Sept. 2002) ("MOWG Study No 8").

[385] AFL-CIO Comments at 3-4; CFA Comments at 54-55, UCC Comments at 2-3; Children Now Comments at 24-28

[386] Several commenters assert that evaluating broadcast-only voices is appropriate because other media are not effective substitutes for television. CFA Comments at 176-77; CWA Comments at 8-13; UCC Comments at 29-35; Children Now Comments at 9-12 Specifically, they contend that television broadcast stations remain the public's primary source of local news and public affairs programming, and that other media contribute little or nothing to viewpoint diversity in local markets. *See* UCC Comments at 29-35; Children Now Comments, IPI Comments at 22. They also contend that free over-the-air television is the only source of any video programming for a significant portion of the U.S population UCC Comments at 29, 32; Children Now Comments at 9; Smith Comments at 3; IPI Comments at 23-24

overly restrictive both for competition and diversity purposes, because it would fail to include other participants in some relevant product markets and in the marketplace of ideas. Such an approach cannot be squared with our statutory mandate under section 202(h) or our desire to minimize the impact of our rules on the rights of speakers to disseminate messages

180. Accordingly, by setting our local television ownership caps only so high as necessary to protect competition in the delivered video market, we will achieve necessary protection for diversity purposes without unduly limiting speech. As set forth above, our current rule is not necessary to protect competition and, indeed, may be harming competition in the delivered video market. It likewise cannot be justified on diversity grounds as it is overly restrictive. Our modifications to the rule, discussed below, remedy that failing.

(ii) Program Diversity

181. The local TV ownership rule has not traditionally been justified on program diversity grounds. However, the *Notice* sought comment on whether common ownership of multiple stations promotes program diversity, and if so, how this affects the need for the current local TV ownership rule. Commenters supporting relaxation or elimination of the local TV ownership rule assert that a single owner of multiple television stations has an enhanced incentive and ability to offer more diverse programming.[387] Entravision, which does not take a position on whether the rule should be modified, agrees that same-market combinations give owners an incentive to increase program diversity by reaching out to minority/niche audiences, but is concerned that entities owning more than one station in a market will engage in anticompetitive conduct that will endanger smaller broadcasters already serving niche audiences.[388] Entravision predicts that ultimately, abuse of market power by "consolidated broadcasters" may drive smaller broadcasters out of business, resulting in a mere substitution of programming for minority/niche audiences, rather than actually increasing program diversity.[389] Children Now asserts the diversity of children's programming will be harmed by an increase in same-market combinations, because local broadcasters will repurpose children's programming, resulting in less original programming for children.[390] Children Now urges us to retain the local TV ownership rule to

[387] Duhamel Comments at 7 (an owner with two or more stations has a greater incentive to diversify its programming to attract new demographics); Entravision Comments at 5-6 (local duopolies have found that it is more profitable not to duplicate formats, but to "reprogram" one station to target underserved audiences); Fox Comments at 51-52; NAB Comments at 36-37, Nexstar Comments at 11-12; Paxson Comments at 13-14; Paxson Reply Comments at 5. Coalition Broadcasters filed a study comparing the pre-and post-combination advertising revenue and audience shares of their stations in LMAs and duopolies Coalition Broadcasters Comments at 7, Attachment A. The study concludes that the combinations result in an average audience share increase of 3.2 points and an average advertising revenue increase of 250.7%. *Id* Coalition Broadcasters believe that, by strengthening their appeal to their local communities and becoming more financially viable, these stations are increasing diversity within their respective markets *Id*

[388] Entravision Comments at 5-6.

[389] *Id.*

[390] Children Now Comments at 13-17. *See also* UCC Comments at 28 (contending that newspaper-broadcast cross-ownership will result in re-purposing of local news); AFL-CIO at 49-50; AFTRA Comments ¶¶ 42-43 (asserting that media concentration in general causes media outlets to obtain and repurpose material from competitors).

ensure that a single owner of multiple television stations in a market does not offer the exact same programming to children as a means of meeting our children's programming requirements.[391] Alternatively, Children Now urges us to clarify that the use of same programming on multiple commonly owned stations in the same market does not satisfy our children's programming requirements.[392]

182. We find that modification of the current local TV ownership rule may enhance program diversity. As we explained in our discussion of policy goals (Section III(A)(2), *supra*), program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. Our local TV ownership rule will ensure robust competition in local DVP markets. As long as these markets remain competitive, we expect program diversity to be achieved through media companies' responses to consumer preferences. Nothing in the record seriously calls that conclusion into question.

183. We share the concern of Children Now that the diversity of children's educational and informational programming could be reduced if commonly owned stations in the same market air the same children's programming. A primary purpose of the Children's Television Act of 1990 was to increase the amount of educational and informational programming available to children.[393] It would be inconsistent with this Congressional objective to permit commonly owned stations in a market to rely on the same programming to meet the obligations set forth in Section 73.671 of our rules.[394] We therefore clarify that where two or more stations in a market are commonly owned and air the same children's educational and informational program, only one of the stations may count the program toward the three-hour processing guideline set forth in Section 73.671.[395]

[391] Children Now Comments at 16-17; *Big Media, Little Kids Media Consolidation and Children's Television Programming, A Report by Children Now* (May 21, 2003) at 2, 5-6, 9 ("*Children Now Report*") (finding that, in the Los Angeles, California DMA, that the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations); *but see,* Letter from John C. Quale, Skadden, Arps, Slate, Meagher & Flom, counsel for Fox, to Marlene H. Dortch, Secretary, FCC (May 28, 2003) ("Fox May 28, 2003 Ex Parte") (disputing findings in the *Children Now Report* with respect to television station combinations in the Los Angeles DMA and urging the Commission not to rely on such findings).

[392] *Children Now Report* at 9.

[393] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U S.C. §§ 303a, 303b, 394. The Children's Television Act of 1990 and our related rules are premised on the notion that market forces are insufficient to ensure adequate levels of children's programming. *See* S Rep. No. 227, 101st Cong., 1st Sess. at 9 (1989); *Policies and Rules Concerning Children's Programming,* 11 FCC Rcd 10660, 10676 ¶ 34 (1995)

[394] *See* 47 C.F.R §73 761.

[395] Under the Section 73 671 processing guidelines, a broadcaster can receive staff-level approval of its renewal application by airing at least three hours per week of programming that satisfies the criteria of programming specifically designed to serve the educational and informational needs of children ("core programming"). 47 C.F.R. § 73 671 Note 2. Alternatively, a broadcaster can receive staff-level renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating (continued)

184. Commenters supporting retention of the current local TV ownership rule focus primarily on the importance of the rule to viewpoint diversity, not other forms of diversity. For example, CFA urges the Commission not to focus on protecting the diversity of entertainment programming, but on the diversity of news and information programming, which it ties to the number of owners, not to types of programming.[396] Although our modifications to the local TV ownership rule may result in increased program diversity, we are not prioritizing program diversity over viewpoint diversity. Rather, we are revising our entire local television ownership framework to reflect the contribution of other media to competition and viewpoint diversity in local television markets. As an added benefit, today's changes to the local TV ownership rule will allow market forces to yield greater program diversity.

2. Modification of the Local Television Ownership Rule

185. Based on our section 202(h) determination that the current local TV rule is no longer necessary in the public interest to promote competition and diversity, as well as our finding that the current rule may hinder achievement of our localism policy goal, we must either eliminate or modify our local TV ownership restrictions. As we will explain further below, we conclude that elimination of the rule would result in harm to competition in local DVP markets, thereby harming the public interest. Elimination of the rule also would adversely affect competition in the advertising and program production markets. Accordingly, we modify the rule.

186. Our modified local TV ownership rule will allow ownership combinations that satisfy a two-part test: a numerical outlet cap and a top four-ranked standard. Our outlet cap will allow common ownership of no more than two television stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. In counting television stations for purposes of this outlet cap, we will include all full-power[397] commercial and noncommercial[398] television

(Continued from previous page)
and informing children can count toward the three-hour processing guideline Licensees not meeting these criteria will have their license renewal applications referred to the Commission.

[396] CFA Comments at 176 (asserting that the debate over media ownership "is about news and information for citizens as listeners and speakers, not about entertainment outlets.").

[397] For purposes of counting the television broadcast stations in the market, we will include only full power authorizations Thus, contrary to the suggestions of some commenters, we will not include Class A TV, LPTV stations or TV translators. *See* IPI Comments at 19-20, 24-27, Louisville Reply Comments at 2-6; at 2; Nexstar May 16, 2003 Ex Parte at 2. LPTV stations typically reach only a small portion of any given DMA, even in the few cases where they are carried by cable systems. Thus, the stations do not compete with DVP market participants on a DMA-wide basis, which we have held is the relevant geographic market We also will exclude from our count any non-operational or dark stations. Newly constructed television stations that have commenced broadcast operations pursuant to program test authority also will be included in the DMA count. Television satellite stations will be excluded from our count of full power television stations in the DMA where the satellite and parent stations are both assigned by Nielsen to the same DMA A satellite station assigned to DMA different from that of its parent, however, will be included in the TV station count for that DMA. DTV stations will be included in our count only if they are operating and are not paired with an analog station in the market.

[398] Our current local TV multiple ownership rule does not restrict the number of noncommercial television stations that can be owned by one entity. Consistent with past practice, our modified rule also will not affect ownership of noncommercial television stations. Our decision to include noncommercial television stations in the TV station count also is consistent with our past practice and with the fact that noncommercial stations compete for viewers in local markets. *See* 47 C F R § 73.3555(b)(2)(ii) (including noncommercial stations in the count for purposes of the eight-voice test under current local TV rule).

broadcast stations assigned by Nielsen to a given DMA.[399] Our top four-ranked standard will prohibit combinations which would result in a single entity owning more than one station that is ranked among the top four stations in the market based on audience share. Hence, same-market combinations will not be permitted in markets with fewer than five television stations. For purposes of applying our top four-ranked standard, a station's rank will be determined using the station's most recent all-day audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed, the same method as under our current rule.

187. The contour overlap provision of the rule will be eliminated, and the modified rule will be applied without regard to Grade B contour overlap among stations. Thus, if two stations in a market do not have overlapping contours, they still cannot be combined unless there are five or more stations in the market and at least one station in the combination is not among the top four. We have determined that, because of mandatory carriage requirements, the DMA – not the area within a particular station's Grade B contour—is the geographic market in which DVP providers compete. Therefore, permitting station combinations solely on grounds that they do not have overlapping contours would be inconsistent with our market definition. As we explained above, the majority of viewers—including those who reside in geographically large DMAs—have access to television broadcast stations that they could not view over-the-air because they can view the stations via cable. Increasingly, local stations also are available via DBS. To avoid imposing an unfair hardship on parties that currently own combinations that do not comply with the modified rule, we will grandfather existing combinations, as discussed further below. In addition, because our assumption regarding DMA-wide carriage is not universally true, and in recognition of the signal propagation limitations of UHF signals, we adopt herein a waiver standard that will permit common ownership of stations where a waiver applicant can show that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area.

188 The public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing viewers.[400] Below, we discuss how our analysis of competition in local DVP markets supports the modified rule.

a. Evaluating Potential Competitive Harms Within Local DVP Markets.

189 Consistent with our competition policy goal, our local television ownership rule seeks to preserve a healthy level of competition in the market for DVP. The state of competition in this market

[399] There are a few instances in which a station's community of license is physically located in one DMA, but the station is assigned by Nielsen to a different DMA We clarify that for purposes of our local TV ownership rule, a station will be considered to be "within" a given DMA if it is assigned to that DMA by Nielsen, even if that station's community of license is physically located outside the DMA In addition, we recognize that certain geographic areas (specifically, Puerto Rico, Guam, and the U.S Virgin Islands) are not assigned a DMA by Nielsen. For purposes of our local TV ownership rule, Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

[400] For a discussion of program provision under different market structures, *see*, Peter Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio* Broadcasting, 66(2) Q. J. ECON 194-223 (1952), MOWG Study No. 6, A Theory of Broadcast Media Concentration and Commercial Advertising by Brendan C. Cunningham and Peter J Alexander (Sept 2002) at 3-5 ("MOWG Study No. 6"); and Sinclair Comments, Baumann/McAnneny Statement at 2-6.

affects the quality and diversity of programming content and therefore the overall welfare of DVP viewers. In formulating our local TV multiple ownership rule, we must assess the nature of this competition and weigh the potential benefits and anticompetitive harms that may arise from the increase in market concentration that results from a single firm owning multiple broadcast stations in a market.

190. There are two potential competitive harms that may be caused by a single firm owning multiple television stations in a market. First, ownership of multiple stations may result in "unilateral effects," *i.e.*, the firm acquiring multiple licenses may find it profitable to alter its competitive behavior unilaterally to the detriment of viewers. An example of such an effect would be the decision to cancel local news programming on one of the commonly-owned channels. Second, the acquisition of multiple licenses in a local market by a single firm may lead to "coordinated effects." That is, the increase in concentration may induce a joint change in competitive behavior of all the market participants in a manner that harms viewers.

191 We recognize the importance of competition from cable networks in the market for DVP. Indeed, viewing of cable network programming now accounts for approximately half of all television viewership.[401] Nevertheless, in formulating our revised ownership rules, we continue to draw a distinction between television broadcast stations and non-broadcast DVP outlets. This is because television broadcast stations and cable programming networks have different incentives to react to a change in local market concentration, which suggest differing levels of unilateral and coordinated effects. In particular, cable networks are almost exclusively offering national or broadly defined regional programming. Therefore, the profit-maximizing decisions of a national cable programmer reflect conditions in the national market. It is improbable that a change in concentration in any single local market would affect the competitive strategy of a national cable network. In contrast, we need to consider the possible competitive responses from other DVP outlets in local markets, which are almost exclusively television broadcast stations. Because of the differing footprints of cable networks and television broadcast stations, any possible competitive harms are more likely to arise from changes in the behavior of stations. Thus, our rules to promote local television competition are focused on ownership of television broadcast stations.

b. Welfare Enhancing Mergers in Local Delivered Video Markets.

192. The standard approach to evaluating the competitive harms of an increase in horizontal market concentration is outlined in the DOJ/FTC Merger Guidelines. The DOJ/FTC Merger Guidelines recognize the HHI level of 1800 as the maximum level of "moderate concentration."[402] We choose this threshold rather than the lower limit of 1000 because we recognize the competitive pressures exerted by the cable networks. The 1800 threshold corresponds to having six equal-sized competitors in a given market. The DOJ/FTC Merger Guidelines however, are written not for a specific industry, but rather as guidelines intended for application across all industries. Our rules are formulated for a specific market—the delivery of video programming—and are based on an extensive record on the extent of competition in this market and the effect of our current local TV ownership rule. This record allows us to craft a more finely-tuned rule for this industry.

[401] In June 2002, cable networks for the first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks collectively registered a 38% primetime share. *See* Romano, *supra* note 248 at 12

[402] *DOJ/FTC Merger Guidelines* § 1 51

193. First, the nature of the DVP market is such that there is constant product innovation with new program choices each season. In such a market, a firm's market share is more fluid and subject to change than in other industries. Hence a firm's "capacity" to deliver programming can be as important a factor in measuring the competitive structure of the market as is its current market share. Second, as each broadcast station requires a license, the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming. Therefore, as a starting point, a simple application of the *DOJ/FTC Merger Guidelines* six-firm threshold suggests that, a single firm holding three licenses in a market with 18 or more licenses, or a firm holding two licenses in a market with 12 or more licenses, would not raise competitive concerns. However, as explained below, given the structure of the DVP market, a strict, overly simplistic application of the *DOJ/FTC Merger Guidelines* would potentially prohibit some welfare enhancing mergers and allow some anticompetitive mergers.

194. Ownership of multiple stations can lead to significant efficiencies. The record demonstrates, for example, that same-market combinations have resulted in an increase in viewership of the lower-ranked of the two stations in the combination, evidencing a welfare enhancing effect for consumers.[403] The possibility of welfare enhancing mergers has long been recognized in economics and antitrust literature. For example, the work of McAfee and Williams demonstrates that strict application of the *DOJ/FTC Merger Guidelines* would disallow some welfare enhancing mergers.[404] McAfee and Williams present a model in which, after a merger of independently owned production facilities, the merged firm will run the two facilities to jointly maximize its profits. McAfee and Williams find that mergers that do not create a new largest firm are welfare enhancing. A similar conclusion is found in the work of Froeb, Werden, and Tardiff ("Froeb *et al.*").[405] In their research, which considers mergers in the context of competition by firms producing differentiated products, Froeb *et al.* find that mergers among smaller firms tend to be welfare enhancing, and that mergers that do not create a significant increase in the market share of the largest firm pose little risk of competitive harm. By contrast, the research of Froeb *et al.* demonstrates that a merger of the second and third largest firms, which would significantly overtake the largest firm in size, would create welfare harms.

195. These results are particularly relevant to competition within local markets for DVP. Each broadcast station tends to deliver a differentiated product, and we have evidence of efficiencies from the ownership of multiple stations in a market. Moreover, in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market.[406] A review of the audience shares of stations in every market with five or more commercial television stations (*i.e.*, 120 markets) indicates that in two-thirds of the markets, the fourth-ranked station

[403] Coalition Broadcasters Comments at Attachment A; *Owen Media Ownership Statement* Of course the opportunity cost of viewership is that time could be spent on some other activity, thus an increase in viewership demonstrates an increase in the public's overall value of the programming.

[404] R Preston McAfee and Michael Williams, *Horizontal Mergers and Antitrust Policy*, XL J. INDUS. ECON 181-87 (June 1992).

[405] Luke M Froeb, Gregory J Werden and Timothy J. Tardiff, *The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries,* Working Paper EAG 93-5 Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Aug. 1993) *See also* Gregory Werden and Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries Logit Demand and Merger Policy*, 10(2) J. L. ECON ORG. 407-16 (1994).

[406] *See* BIA Media Access Database (Mar. 18, 2003).

was at least two percentage points ahead of the fifth-ranked station.[407] Two percentage points represents a significant difference in audience share because for a station to jump from, for example, an eight share to a ten share, it would have to increase its audience share by 25%. Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the fifth and sixth ranked networks each earn a four percent share.[408] While there is variation in audience shares within local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which we base our rule.

196. Other persuasive evidence of a separation between top four-ranked stations and other stations includes a study comparing audience shares of stations in ten markets of various sizes.[409] The study finds that the top four-ranked stations control a combined total of at least 75% of each market's audience share.[410] Mergers of stations owned by any of these top four firms would thus often result in a single firm with a significantly larger market share than the others. Our analysis of the top four local stations is related to our analysis of the four leading broadcast networks in connection with the dual network rule. There we conclude that Big Four networks continue to comprise a "strategic group" within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks.[411]

---

[407] IPI contends that the use of audience share rank as a metric in evaluating local ownership is "problematic" because ranks vary from quarter to quarter IPI Comments at 19. In support of this, IPI cites data showing that, over an 18-month period, three different stations occupied the fourth-ranked position in the Los Angeles, California DMA. *Id.* As we explain above, our review of BIA data in over 120 DMAs shows that in over two-thirds of these markets, at least two percentage points separate the fourth and fifth ranked stations In light of this evidence gathered from our review of a broad range of DMAs, we do not agree that data from a single DMA should dictate whether we rely on audience share rank as a metric for purposes of our local TV ownership rule

[408] *Nielsen Ratings,* BROADCASTING & CABLE (May 26, 2003) at 11.

[409] *See* UCC Comments in MM Docket No 01-235 at Attachment 3. UCC conducted a study of ten local television markets of various sizes. The UCC study found that in all markets, including the two largest television markets (New York, New York and Los Angeles, California), the top four-ranked television stations control more than 75 percent of the market, measured by viewership over the twelve-month period In four of the markets, the top four stations had more than 90 percent of the market, and in three markets, the top four stations had 100 percent of the market. *Id.*

[410] *Id*

[411] The local television ownership rule is consistent with a key aspect of our national television ownership rule in recognizing competitive disparities among stations. Our national television ownership cap recognizes competitive disparities between stations through use of the UHF discount, while our local television ownership cap recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in a market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations The local ownership rule, on the other hand, places a limitation on the (continued)

197. Permitting mergers among top four-ranked stations also would generally lead to large increases in the HHI. Although we believe that mechanical application of the *DOJ/FTC Merger Guidelines* may provide misleading answers to competitive issues in the context of local broadcast transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.[412] Commenters who urge us to permit more same-market combinations focus primarily on the efficiencies and public interest benefits associated with a financially strong station merging with a financially weak station.[413] Such mergers are unlikely to create or enhance market power or to facilitate its exercise. In contrast, no commenter discussed the efficiencies and public interest benefits associated with a merger between two financially strong stations. Nothing in the record indicates that such mergers will produce efficiencies that translate into benefits for the viewing public. To the contrary, such mergers are likely to create or enhance market power or to facilitate its exercise Therefore, by allowing firms to own multiple stations, but prohibiting combinations among the top four-ranked stations, we enable the market to realize efficiency gains and improve the quality of product in the video programming market while mitigating the risk of harmful coordinated or unilateral competitive harms.

198. One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. Some commenters contend that the Commission has never demonstrated that top four-ranked stations are generally the market's news providers. Yet the data provided by some of these very commenters confirms that this is the case. In support of its contention that the Commission should eliminate the top four-ranked restriction, Fox submitted an empirical study that compares the local news offerings of top four-ranked stations and other stations in the 210 DMAs.[414] The Fox Top Four Study finds that 668 stations ranked among the top four offer local news.[415] We have determined that, because there are less than four stations in some markets, the total number of top four-ranked stations is 779. Therefore, fully 85% of top four-ranked stations offer local news. Fox also found that 164 stations ranked outside the top four offer some local news, although this includes stations that do

(Continued from previous page)
number of stations that one entity may own in a market Thus, that rule limits mergers of the top four-ranked stations in a market. Furthermore, in the local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed further below. Finally, we note that the top-four merger restriction in our local television ownership rule and the UHF discount in our national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose. The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks. The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule

412 *FTC v Heinz*, 246 F.3d 708, 716 (D.C Cir 2001)

413 NAB proposes a local television ownership rule "that would provide needed financial relief for lower-rated stations (which are particularly struggling financially)" NAB Comments at 70. Coalition Broadcasters provide examples of joint operations involving at least one weak station, with little, or no, local news, and argue that these combinations make it possible for "those struggling stations to survive." Coalition Broadcasters at 15 – 33, and Attachment A at 1. Nexstar argues that without joint operation, many stations in small and mid-sized markets will not survive. Nexstar May 16, 2003 Ex Parte at 1.

414 Fox Comments, Economic Study A, *News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations* (*"Fox Top Four Study"*).

415 *Id* at 8-14.

not originate their own news programming.[416] We have determined that there are 854 stations not ranked among the top four. Thus, even including stations that are re-broadcasting the local news of another station, Fox's data show that only 19% of stations outside the top four offer local news. Because top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station.

199. We also have determined that same-market combinations yield efficiencies that may expedite a station's transition to DTV. However, combinations involving more than one top four-ranked station also are less likely to provide public interest benefits in the form of new DTV service. The financial position of top four-ranked stations makes the transition to DTV more affordable for these stations.[417] Top four-ranked stations also are more likely to have made the transition to DTV than other stations.[418] We therefore conclude that it is less likely that allowing same-market combinations involving more than one top four-ranked station will expedite the provision of DTV service to the public.

200. Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass audiences. The strongest rival to a top four-ranked station is another top four-ranked station. Because top four-ranked stations typically offer programming designed to attract mass audiences, as opposed to niche audiences, a new popular program offered by one top four-ranked station will have a substantial negative impact on the audience shares of the other top four-ranked stations. The enormous potential gains associated with new popular programs provide strong incentives for top four-ranked stations to develop programming that is more appealing to viewers than the programming of their closest rivals. The large number of viewers looking for new programs with mass audience appeal are the direct beneficiaries of this rivalry. When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers.

201. Our decision to allow common ownership of two television stations in markets with fewer than twelve television stations will result in levels of concentration above our 1800 HHI benchmark in markets with fewer than 12 television stations. We permit this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets get

[416] *Id*

[417] NAB submitted data comparing the average cash flow and pre-tax profits of Big Four affiliates and other stations *See* Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (Apr. 30, 2003) at 2, Chart 1 ("NAB Apr. 30, 2003 Ex Parte"). These data show that, for example, in 2001, Big Four affiliates in the largest markets (*i e.,* DMAs 1-25) had an average cash flow of $27,410,975, as compared to just $8,013,317 for stations not affiliated with one of the four major networks. *Id* The average pre-tax profit of a Big Four affiliate that year was $20,356,967, as compared to only $2,807,447 for other stations in the largest markets. *Id.* Because most stations affiliated with the Big Four networks also are top four-ranked stations, we find this data probative of the differences in the financial positions of top four-ranked stations and other stations.

[418] As of May 21, 2003, 903 commercial DTV stations were on the air pursuant to a license, program test authority or special temporary authority. Of these stations, approximately 60% were paired with analog stations that were ranked among the top four in terms of audience share as of the most recent sweeps period. *See* BIA Media Access Database (Mar 18, 2003)

smaller.[419] The record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets. In particular, NAB submitted financial data comparing the average 2002 gross revenues of commercial stations across all DMAs. The data demonstrate that there are fewer stations in smaller DMAs, but as the average number of stations declines, the reduction in the number of stations is outpaced by the decline in average gross revenue.[420] Thus, small market stations are competing for disproportionately smaller revenues than stations in large markets.[421] NAB also submitted data comparing the average pre-tax profits of Big Four network affiliates in DMAs of various sizes.[422] These data show that affiliates in the largest markets (*i.e* , the top 25 DMAs) had an average pre-tax profit of $20,356,967 in 2001,[423] as compared with an average pre-tax profit of just $1,269,239 among affiliates ranked highest in audience share in the smallest markets (*i e.*, DMAs 151-175).[424] The lowest ranked affiliates in the smallest markets showed negative average pre-tax profits at -$92,917.[425] We find these data probative of the different economics of station ownership depending on market size. The data confirm that the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets.

202. Moreover, Congress and the Commission previously have allowed greater concentration of broadcast properties in smaller markets than in larger markets precisely because the fixed costs of the broadcasting business are spread over fewer potential viewers. In 1992, the FCC allowed one firm to own a larger percentage of the total radio outlets in smaller markets.[426] In 1996, Congress's local radio caps were built on this same principle. In the largest markets, it required six independent station owners, but in the smallest markets, it permitted just two firms to own all the radio stations. The limits we adopt today for local television ownership replicate this graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets.

203. The above discussion illustrates why we must avoid an oversimplified application of the

---

[419] For purposes of applying our cross media limits, which are diversity based, we found that markets with nine or more television stations have a sufficiently large number of media outlets that viewpoint diversity will be protected by our caps on local television and local radio ownership. Measuring the extent of diversity in a market is a separate question from measuring the extent of competition among a particular class of outlets, such as local television stations. Thus, a market with ten television stations can be characterized as "large" from a viewpoint diversity standpoint because of the substantial number of media outlets available in such markets, but "small to mid-sized" when considering solely competition in the delivered video market (which excludes outlets such as radio, newspaper, and the Internet).

[420] NAB Apr. 30, 2003 Ex Parte at 2, Chart 1.

[421] *Id.*

[422] *Id.*, NAB Comments, Small to Medium Markets Statement

[423] NAB Apr 30, 2003 Ex Parte at 1, 3.

[424] NAB Comments, Small to Medium Markets Statement, Table 6.

[425] *Id.*

[426] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (finding that competitive realities are substantially different in markets of different sizes).

DOJ/FTC Merger Guidelines. In particular, the analysis suggests that anticompetitive harms may result from allowing the largest firms to merge, and that we might lose welfare enhancing efficiency gains by disallowing mergers between stations with large audience shares and stations with small audience shares. To allow the market to realize these efficiency gains and prevent potential harms from undue increases in concentration, we therefore allow combinations of two stations provided they are not both among the top four-ranked broadcast stations in the local market. In markets with at least 18 television stations, we further allow a firm to own up to three stations (thus ensuring a minimum of six owners) provided that only one of them is ranked among the top four.

3. Other Issues

a. Alternate Proposals

(i) Proposals to Retain the Existing Rule in its Current Form or With Minor Modifications

204. A number of commenters urge us to retain the existing rule, or make minor modifications.[427] Children Now proposes that the Commission modify the existing rule by prohibiting common ownership of television stations with overlapping Grade B contours in the same market, as it did prior to its 1999 revisions to the rule.[428] AWRT, AFL-CIO, and AFTRA urge the Commission to retain the existing rule, but to count only those voices that actually provide local programming.[429] Children Now and UCC state that if the Commission chooses to revise the current rule by expanding the types of media voices that are considered for purposes of the local television ownership rule, it should raise the threshold voice count required to form a same-market combination.[430] As we explained above, we have determined that retaining our current rule does not comport with our statutory mandate under section 202(h) on competition, diversity, or localism grounds. For the same reasons, we disagree with commenters who contend that an equally restrictive or more restrictive ownership rule is necessary in the public interest. Although our modified rule does not rely upon a "voice test," it calculates the number of stations one can own in a market based, in part, on the number of stations within that market. However, our decision to "count" only broadcast television stations is based on the likely responses of participants in the DVP market to changes in local market concentration, and is aimed at achieving competition in local markets.

205. Smith proposes that if we relax the rule, we should prohibit common ownership of more than one station affiliated with a top four network.[431] Our revised rule prohibits common ownership of stations that are among the top four in terms of audience share. Although such stations are often

[427] These include AFL-CIO, AFTRA, AWRT, CFA, Children Now, CWA, Smith, Stapleton, and UCC. AFL-CIO Comments at ii, 47, AFTRA Comments ¶ 31, CFA Comments at 9, 284, Children Now Comments at ii, 3, CWA Comments at 3, 46; Smith Comments at 3; Stapleton Comments at 15-16; UCC Comments

[428] Children Now Comments at 3.

[429] AWRT Comments at 8, AFL-CIO Comments at 56.

[430] Children Now Comments at 3, UCC Comments at 46.

[431] Smith Comments at 3. Smith states that prohibiting combinations of Big Four network affiliates would help preserve existing independent sources of local news

affiliated with top four networks, we conclude that audience share rank is a more accurate measure of market power than network affiliation. Therefore, we do not adopt Smith's proposal to prohibit common ownership of more than one station affiliated with a top four network.

206. CFA asserts that while the Commission has ample justification for retaining the current rule, if it chooses to revise the rule, it should apply an "HHI-adjusted voice count" to local TV ownership.[432] Under CFA's proposal, the Commission would calculate the market shares of television broadcast stations in the relevant geographic market, which would be either the DMA or a "weighted average DMA," calculated to account for the fact that certain stations do not have cable carriage throughout the market.[433] CFA proposes that the Commission define highly concentrated markets as those with fewer than six equal-sized voices or a four-firm concentration ratio above 60%.[434] Moderately concentrated markets would be those with between six and ten equal-sized voices or a four-firm concentration ratio of 40-60%[435] CFA urges us to prohibit any combination that would result in a highly concentrated market.[436] Where a combination would result in moderate concentration, CFA proposes that we permit the combination only if we find that the merger will serve the public interest and if the owner of the merging stations agrees to retain separate news and editorial departments in different subsidiaries of the merged entity.[437]

207 Our modified local TV ownership rule will ensure that there are at least six firms in significant number of markets (*i e.*, all markets with 12 or more television stations), much like CFA's proposal. CFA's proposal does not, however, adequately address record evidence of differences in the economics of broadcast stations in smaller markets. Much like the strict application of the *DOJ/FTC Merger Guidelines* discussed earlier, CFA's proposed test would prohibit certain mergers that will result in welfare enhancing efficiencies. Accordingly, we decline to adopt CFA's proposal. With regard to CFA's waiver proposal, we do not agree that conditioning assignments/transfers on retention of separate news departments within separate subsidiaries of a merged entity is necessary to advance our diversity, competition or localism goals. Requiring compliance with our rules, rather than conducting case-by-case evaluations or imposing merger conditions, is a more effective way to achieve these goals.

208. Entravision does not take a position on whether the rule should be relaxed, but proposes that if the rule is relaxed, the Commission should require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely

---

[432] CFA Comments at 284-85.

[433] *Id* at 166-167, 284-85, 289. CFA does not specify whether market shares are to be calculated based on audience share or advertising revenue share.

[434] *Id.* at 286

[435] *Id*

[436] *Id.*

[437] *Id.* at 284-85. Combinations resulting in moderately concentrated markets also would be subject to a *de minimis* exception under which market participants could acquire small firms (*i e.*, those with a market share of less than 2%). *Id.* at 288.

affect smaller broadcasters in their markets.[438] We do not agree with Entravision that modifying the local TV ownership rule will increase the likelihood of anticompetitive conduct by broadcasters that own more than one station in a market, or that a certification requirement is necessary to protect against such conduct. Certainly, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes. In addition, an antitrust law violation by a licensee would be considered as part of our character qualifications review in connection with any renewal, assignment, or transfer of a license.

(ii) Proposals to Eliminate or Substantially Modify the Rule

209. Several commenters propose that we eliminate the current rule or substantially modify the rule in order to permit more same-market combinations.[439] Among these are a proposal to allow common ownership of two television stations in all markets with four or more stations, a proposal to eliminate the top four-ranked standard, a proposal to eliminate the voice test provision of the rule but to retain the top four-ranked restriction, NAB's proposed "10/10" standard, and Hearst-Argyle's AMI proposal. Below, we discuss these proposals.

210. We do not agree with several commenters who propose that we eliminate all local television ownership restrictions.[440] As we explained above, the public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by viewers.[441] Most commenters proposing elimination of the rule believe that antitrust authorities will protect against any public interest harms that may result from combined ownership of multiple television stations in a market. As we explain at Section III(B) above, we do not agree with commenters who urge us to eliminate our rules and defer all competition concerns to the antitrust authorities

211. We conclude that, as compared to the modified rule, the rule modification proposals advanced by commenters are more likely to result in anomalies and inconsistencies, or will otherwise fail to serve our policy goals. For example, by proposing that we permit common ownership of two television stations in all markets with four or more stations, Nexstar attempts to account for the differing economics of stations in small markets.[442] However, unlike our modified rule, the Nexstar proposal does

[438] Entravision Comments at 8-10. Entravision makes the same proposals with regard to relaxation of cross-ownership rules. Id. These certifications would be required in connection with license renewals, applications for assignment or transfer of control of a license, and at license mid-term when stations' EEO compliance is reviewed.

[439] *See generally,* Alaska Comments; Belo Comments; Duhamel Comments; Emmis Comments; Fox Comments; Granite Comments; Gray Comments, Hearst-Argyle Reply Comments; Media General *et al* Comments; Paxson Comments; Sinclair Comments, Westwind Reply Comments.

[440] *See* Alaska Comments at 2, 6-7, Fox Comments at 2-3, 6, 33-34, 58-59, Gray Comments at 6, 19, Media General *et al* Comments at 2, 8, Sinclair Comments at i-iii, 8-9, 60.

[441] For a discussion of program provision under different market structures, *see*, Steiner, *supra* note 400; MOWG Study No. 6 at 3-5; Sinclair Comments, Baumann/McAnneny Statement at 2-6.

[442] Nexstar Comments at 15, 21

not protect against combinations of the market participants with the largest audience shares, combinations that are more likely to cause competitive harms. It also permits extremely high concentration levels in the very smallest markets—there could be as few as two competitors in markets with four television stations. We find that the levels of concentration permitted by the Nexstar proposal are likely to result in harm to competition in local DVP markets.

212 Similar competitive harms would result if we adopted proposals to eliminate or modify the top four-ranked standard.[443] Emmis claims that the top four-ranked standard cannot be justified on diversity or competition grounds.[444] Several commenters agree.[445] We are not relying on the top four-ranked provision of our modified local TV ownership rule to promote diversity, although we recognize that because the marketplace for ideas is broader than the DVP market, rules intended to promote competition also will promote diversity. We disagree with commenters' claims that the top four-ranked standard is not justified on competition grounds. At the time of our last review of the local TV ownership rule, we lacked sufficient record data concerning competitors to local television stations.[446] In the instant proceeding, we face no such shortage of evidence concerning which media compete with local TV. Having determined that television competes with all providers of DVP, we have crafted a rule that appropriately takes account of competition from other sources of DVP, and will ensure competition in local DVP markets. We do not agree that elimination of our top four-ranked standard, use of a top three-ranked standard,[447] or use of a tiered system that would ban mergers among top four-ranked stations only in the largest markets and permit certain top four-ranked combinations in smaller markets,[448] would serve

[443] *See* Emmis Comments at 23-33; Fox Comments at 50; Sinclair Comments at 41-46; Letter from Howard M. Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H Dortch, Secretary, FCC (May 29, 2003) ("Nexstar May 29, 2003 Ex Parte"); Letter from Gary R. Chapman, President, LIN Television Corporation, Paul H. McTear, President & CEO, Raycom Media, Inc , Bernard E. Waterman, President & Director Waterman Broadcasting Corporation, and Lara Kunkler, President and General Manager, Montclair Communications, Inc., to Marlene H. Dortch, Secretary, FCC (May 15, 2003), Letter from Robert A. Beizer, Vice President of Law & Development, Gray Television, Inc., to Marlene H Dortch, Secretary, FCC (May 29, 2003) ("Gray May 29, 2003 Ex Parte"); Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (May 22, 2003) ("NAB May 22, 2003 Ex Parte") (proposing a tiered approach which would prohibit top four-ranked combinations in DMAs 1-25, top three-ranked combinations in markets 26-75, and top two-ranked combinations in markets 76-210); *Duopoly Relief Needed – 4th Ranked Stations Significantly Trail 3rd Ranked Stations*, Bear Stearns (May 29, 2003) (proposing a top three-ranked standard) ("Bear Stearns May 29, 2003 Ex Parte")

[444] Emmis Comments at 23-33. Emmis states that it has a temporary waiver authorizing its ownership of two television stations in the Honolulu, Hawaii DMA. Emmis Comments at 2. The top four-ranked standard prohibits Emmis' permanent ownership of this combination

[445] *Fox Top Four Study*, *supra* note 414 (asserting that the top four restriction incorrectly seeks to promote diversity based on an unsupported assumption that top four-ranked stations are more likely to offer local news, although numerous stations that are not among the top four-ranked actually air local news); Sinclair Comments at 41-46, Exhibits 22-23 (asserting that if the intent of local TV rule is to prevent combinations involving stations that offer local news, the should do so explicitly because there is no empirical basis for view that only top four offer local news) *See also* note 443, *supra*

[446] Emmis Comments at 31-32

[447] Bear Stearns May 29, 2003 Ex Parte.

[448] NAB May 22, 2003 Ex Parte.

the public interest. As discussed above, top four-ranked combinations are likely to harm competition in the DVP market,[449] and are less likely to produce offsetting public interest benefits.[450]

213. We believe that a more targeted approach to account for possible harms of application of the top four-ranked restriction is to establish a waiver standard tailored to the top four-ranked restriction. This approach will preserve competition in the DVP market while accommodating those instances where application of the top four-ranked restriction would harm the public interest. We discuss modifications to our current waiver standard in a separate section below.

214. Belo takes a nearly opposite approach, proposing that we permit same-market combinations provided that they satisfy our top four-ranked standard, but eliminate our voice test.[451] We agree that, as it is used in our modified rule, a top four-ranked prohibition is an appropriate means of protecting against combinations that would have an enhanced ability or incentive to engage in anticompetitive conduct.

215. NAB proposes that we permit combinations where at least one of the stations has had, on average over the course of a year, an all day audience share of ten or less (the "10/10" proposal).[452] NAB asserts that the audience share data used for this calculation should include viewing of out-of-market broadcast stations and cable networks, to account for competition from these sources.[453] NAB proposes that we treat the 10/10 standard as a presumption, and urges us to consider proposed combinations that do not meet this standard (including same-market combinations of three stations) on a case-by-case basis, considering factors which we discuss further below along with other waiver proposals.[454] NAB asserts that its proposed test would be easy for applicants to use and for the Commission to apply, would provide needed financial relief for struggling stations in small and medium markets and those that are lower-rated, and, by prohibiting combinations of leading stations, would effectuate our diversity and competition goals.[455] According to NAB, a ten viewing share effectively separates market leading stations from non-leading stations on a consistent basis across DMAs of varying size.[456] NAB urges the Commission to allow broadcasters to transfer combinations created pursuant to the 10/10 standard even if one or both stations has increased its viewing share above the ten threshold at the time of such transfer.[457] NAB asserts that requiring licensees to find separate purchasers will be disruptive and will tend to

[449] *See supra* ¶¶ 195-200

[450] *See supra* ¶¶ 198-199

[451] Belo Comments at ii-iii.

[452] NAB Comments at 79

[453] *Id.*

[454] *Id.*

[455] *Id.* at 79-81

[456] *Id.* 81-82 NAB further asserts that the proposal will advance our localism goal by preserving struggling stations and by enhancing stations' financial viability, which will enable them to continue or initiate local news programming. *Id* at 82-83

[457] *Id.* at 83-84

discourage investment in broadcast stations. Of the commenters who support the 10/10 proposal, some support the proposal as advanced by NAB; others support it with modifications; others suggest it be used only as a safe harbor, allowing for many other types of combinations.[458]

216. Although it supports the 10/10 proposal, Hearst-Argyle asserts that the most important deficiency of the proposal is that there is little record support for NAB's contention that ten is an ideal "cut-off point" between leading stations and others. Similarly, UCC states that in many markets, ten is the average share for any given broadcast station, and is not a dividing line between leading and struggling stations.[459] UCC contends that NAB has not shown that all, or even most, stations with a viewing share under ten are struggling to achieve financial viability.[460] UCC asserts that, to the contrary, 10/10 will permit common ownership of top-ranked stations in many markets.[461]

217. The record in this proceeding supports a rule that will allow financially weak stations to combine with each other or with stronger stations in order to realize efficiencies. We have identified several benefits of such combinations. The 10/10 proposal, however, would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets. Neither the record nor standard competitive analysis justifies a rule that will permit such mergers. Our analysis suggests that combinations among the top four rated broadcast stations would create welfare harms. We also agree with commenters who contend that the proposal does not adequately justify the use of ten as a threshold. The record demonstrates that in many markets ten is the average share for any given station, sometimes even the very highest rated stations, in the market. In addition, the proposal provides no clear rationale to justify why, for example, a combination involving two stations with respective audience shares of 25 and 9 should be permitted, although a combination involving two stations with respective audience shares of 12 and 11 should be prohibited. For these reasons, we reject the 10/10 approach.

218. Hearst-Argyle advances an alternative proposal.[462] Hearst-Argyle's proposal would permit common ownership of any number of television stations in the same market provided that the

---

[458] Coalition Broadcasters Comments at 11-12; Desmond Reply Comments at 8; Duhamel Comments at 2; Gray Reply Comments at 6-7; Hearst-Argyle Reply Comments at 10-11; Pappas Comments at 13-15; Paxson Comments at 30-31, Westwind Reply Comments at 3. Coalition Broadcasters suggest modifying the proposal to establish a threshold share as high as 15 instead of ten for combinations in smaller markets. Coalition Broadcasters Comments at 11-12. Desmond urges us to adopt the proposal but to rely on audience share data that does not include out-of-market or non-broadcast viewing. Desmond Reply Comments at 8. Gray and Paxson support the 10/10 proposal as an alternative to eliminating the current local TV rule. Gray Reply Comments at 6-7, Paxson Comments at 30-31. Sinclair opposes the proposal but suggests that it could serve instead as a safe harbor. Sinclair Reply Comments at 5.

[459] UCC Comments at 20-21, Exhibit 1.

[460] UCC further contends that NAB has not shown that allowing such combinations will benefit the public. UCC Comments at 21, 23. UCC asserts that, to the contrary, such combinations will result in significant harm to diversity in local markets. *Id* at 17-20.

[461] UCC Comments at 18, Exhibit 1. As an example, UCC states that only one station in the San Francisco, California DMA has had an average viewing share of ten or more in the past four Nielsen books, which means that, under 10/10, a single entity could combine the top two-ranked stations in the market. *Id.* Similarly, in the Washington, D C. DMA, three of the four top rated stations have average viewing shares below or near 10 *Id*

[462] Hearst-Argyle Reply Comments at 13-19.

stations' combined audience share does not exceed 30%.[463] Combinations that would result in an audience share above 30% would be subject to an Audience Market Index ("AMI") cap that is calculated in a manner similar to an HHI, but uses audience share data rather than advertising share data.[464] If a combination would result in AMI below 1000, the combination would be permitted, regardless of the increase in concentration.[465] A combination resulting in an AMI between 1000 and 1800 would be permitted if the increase in AMI is less than 100 points, and a combination resulting in an AMI above 1800 would be permitted only if it increases AMI by less than 50 points.[466] Hearst-Argyle asserts that by using an audience share metric, its proposal objectively measures and protects both diversity and competition.[467] Hearst-Argyle contends that its proposal also is likely to survive judicial scrutiny because its 30% hard cap and AMI analysis are both based on antitrust law and analysis.[468] In addition, Hearst-Argyle contends that its proposal avoids several pitfalls of the NAB 10/10 proposal.

219. We do not agree with Hearst-Argyle that simply because courts have accepted presumptions of 30% market share as demonstrating market power in the context of the antitrust statutes, we should establish a presumption that 30% is an appropriate audience share limit. The Hearst-Argyle proposal does not place specific limits on the number of broadcast television stations an entity could own in a local market. An entity could acquire any combination of stations in a local market as long as its audience share is 30 percent or less, and the AMI cap is satisfied. In many markets, this approach would permit an entity to own four, five, six or more stations. We do not believe that consolidation in a market of a large number of stations with low audience share is in the public interest. Although an individual station may currently have a small audience share in the DVP market, each station's audience share has the potential to change over time. The number of stations a firm owns is a measure of its capacity to deliver programming. This capacity can be as important a factor in measuring the competitive structure of the market as is its current audience share. Moreover, much like the 10/10 proposal, the AMI test will frequently result in common ownership of stations ranked among the top four in the market. It will also permit common ownership of three stations in many more markets than will our modified rule – including some very small markets. As shown by one of Hearst-Argyle's own examples, under certain circumstances, the AMI test would even permit common ownership of three of the top four-ranked stations in a market with just five full-power television stations.[469] Because of the anticompetitive harms that would result from combinations allowed by the AMI test, we will not adopt Hearst-Argyle's AMI proposal.

[463] *Id.* at 14.

[464] *Id.* at 14-16.

[465] *Id.* at 16.

[466] *Id* at 16-17.

[467] *Id.* at 17-18. Hearst-Argyle notes that because all viewable channels are included in its analysis, its proposal reflects competition from viewing of cable channels

[468] *Id.* at 18. Specifically, Hearst-Argyle states that its 30% cap derives from Supreme Court precedent (citing *U S vs Philadelphia National Bank,* 374 U S. 321, 364 (1963)) and notes that its AMI analysis is similar to DOJ antitrust analysis using the *DOJ/FTC Merger Guidelines*

[469] *Id.*, Appendix at 1.

220. NAB proposes an alternative that would combine the 30% audience share cap of the AMI test with a ban on common ownership of more than three stations in any market, and a ban on common ownership of more than two top four-ranked stations in the same market.[470] For similar reasons, we do not accept this proposal. As discussed herein: (1) a ban on combinations among the top four-ranked stations is necessary to promote competition; (2) a 30% share cap would permit combinations that undermine that goal; and (3) ownership of three television stations in markets with fewer than 18 stations would harm competition by consolidating capacity in the hands of too few owners. Our modified rule better effectuates our goal of promoting competition in local DVP markets.

b. Waiver Standard

221 In our *Local TV Ownership Report and Order*, we established a waiver standard for purposes of our local TV ownership rule. The standard permits a waiver of the current rule where a proposed combination involves at least one station that is failed, failing, or unbuilt. We define a "failed station" as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings.[471] Our "failing" station standard provides that we will presume a waiver is in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had low all-day audience share (*i.e.*, 4% or lower); (2) the financial condition of one of the merging stations is poor;[472] and (3) the merger will produce public interest benefits.[473] Our unbuilt station waiver standard presumes a waiver is in the public interest if an applicant meets each of the following criteria. (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so.[474] For each type of waiver, we also require that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.[475] Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets our local TV ownership rules or one of our three

[470] Letter from Edward O. Fritts, President and CEO, NAB, to Marlene H Dortch, Secretary, FCC (May 28, 2003).

[471] 47 C.F.R § 73 3555, Note 7 (1).

[472] We have stated that a waiver is more likely to be granted where one or both of the stations has had negative cash flow for the previous three years. The applicant must submit data, such as detailed income statements and balance sheets, to demonstrate this. Commission staff evaluate the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.

[473] For purposes of this criterion, we also stated that at the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. *Local TV Ownership Report and Order,* 14 FCC Rcd at 12939 ¶ 81

[474] *Id* at 12941 ¶ 86.

[475] 47 C.F.R. § 73.3555, Note 7. One way to satisfy this criterion is to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received. *Local TV Ownership Report and Order,* 14 FCC Rcd at 12941 ¶ 86.

waiver standards at the time of transfer.[476]

222. Our rationale for adopting these waiver criteria was that failed, failing and unbuilt stations could not contribute to competition or diversity in local markets, and that the public interest benefits of activating a dark or unbuilt station, or preventing a failing station from going dark, outweighed any potential harm to competition or diversity.[477] Most commenters addressing the waiver standard urge us to relax or eliminate the standard. NAB urges the Commission to evaluate, on a case-by-case basis, combinations that do not meet its proposed local TV ownership rule.[478] For purposes of this case-by-case evaluation, NAB proposes that the Commission expand its current waiver standard to include consideration of waivers that will facilitate a station's DTV transition or maintain existing local news operations.[479] Paxson agrees.[480] Pappas and NAB urge us to eliminate the requirement that the applicant demonstrate that there are no available out-of-market buyers for a subject station.[481] Coalition Broadcasters assert that the current "failing" station standard is too stringent to provide meaningful relief, and does not reflect market realities.[482] Coalition Broadcasters propose that we eliminate the current waiver standard and evaluate waivers on a case-by-case basis, considering factors such as the financial position of the station, penetration levels of other local media, levels of competition in local markets, and whether a combination will promote innovation.[483] Media General *et al.* urge us to allow transfer of combinations created pursuant to a waiver, even if the combination does not satisfy our local TV ownership rule or waiver standards at the time of transfer.[484] They assert that such transferability would encourage investment in failed, failing, or unbuilt stations.[485]

223. UCC opposes relaxation of the current waiver standard, asserting that the relaxation proposals advanced by NAB and others will allow for many more combinations, thereby dramatically

---

[476] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41 ¶¶ 77, 81, 86.

[477] *Id* at 12941 ¶ 85

[478] NAB Comments at 79-80 *See also* Gray Comments at ii (urging Commission to establish a flexible waiver standard should it retain any local TV ownership restrictions)

[479] NAB Comments at 79-81; Pappas Comments at 14-15.

[480] Paxson Comments at 31. *See also* Gray May 29, 2003 Ex Parte (urging us to consider case-by-case waiver requests for combinations in small and medium markets).

[481] Pappas Comments at 14-15; NAB Comments at 80 n.148.

[482] Coalition Broadcasters Comments at 12-14 *See also* Alaska Comments at 2-3. Coalition Broadcasters contend that the failing station standard's focus on negative cash flow is misplaced, because other factors, such as excessive debt and interest obligations, also can cause a business to fail. Coalition Broadcasters Comments at 12-13 *See also* NAB Comments at 80 n.149 (urging the Commission to eliminate the requirement to demonstrate negative cash flow). Coalition Broadcasters also contend that 4% audience share does not reflect financial viability, and that many stations with higher audience shares also are failing. Coalition Broadcasters Comments at 12-13.

[483] Coalition Broadcasters Comments at 12-14.

[484] Media General *et al* Comments at 7.

[485] *Id*

reducing viewpoint diversity in local markets [486] UCC contends that a waiver standard connected to the DTV transition would only delay the DTV transition because it would give broadcasters an incentive to stall transitioning stations in order to qualify for a waiver.[487] CFA supports the adoption of a new case-by-case waiver standard that would allow applicants that do not meet its proposed local TV ownership restriction to obtain waivers if the Commission finds that the combination serves the public interest and if the new owner will preserve functionally separate news and editorial departments within separate subsidiaries.[488]

224. We conclude that tightening our waiver standard would not promote our public interest goals, as discussed below. Moreover, we agree with the NAB and other commenters who urge us to expand our waiver standard to include consideration of combinations that will yield other public interest benefits. Our treatment of waivers will follow the competition principles established in the *DOJ/FTC Merger Guidelines*, with a specific focus on the industry at hand. In particular, as in the *DOJ/FTC Merger Guidelines*, we will consider combinations that involve firms that are not failing but that could better serve the public interest through a merger not otherwise permitted by our rules.[489] We also will consider a waiver of our local TV ownership rule where a proposed combination involves stations that do not engage in head-to-head competition because they do not have overlapping Grade B contours and are not carried by MVPDs in the same geographic areas.

225. First, for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.[490]

226. Otherwise, however, a failed, failing, or unbuilt station clearly cannot contribute to localism, competition or diversity in local markets. Nothing in the record in the instant proceeding leads us to find otherwise. We conclude that the public interest benefits of activating a dark or unbuilt station, outweighs the potential harm to competition or diversity. Therefore, if it can be shown that, absent the transfer, the licensee's assets will exit the market, then the transfer is not likely to either enhance market power or facilitate its exercise. In such cases, the granting of a waiver would not be inconsistent with our competition goal.

227 The record also suggests that local television stations outside the largest markets may, in some cases, better serve the public interest through station combinations not permitted by our local television ownership rules Our new rules allow one company to own two stations in a market provided

[486] UCC Reply Comments at 23-26

[487] *Id.* at 25-26

[488] CFA Comments at 288.

[489] See the *DOJ/FTC Merger Guidelines* §§ 5 1, 5 2 (discussing mergers involving a failing firm and a failing division)

[490] NAB Comments at 80 n.148.

both are not ranked in the top four in ratings. This top four-ranked prohibition promotes competition by preventing the strongest competitors in each market from combining. The top four restriction is premised on evidence that the four leading stations in each market are already the strongest competitors and that combinations among them would harm the public interest by diminishing competition in the DVP market.[491] However, NAB data shows that, as a class, smaller market stations (including both top four and other stations) are less effective competitors in the DVP market relative to stations in large markets.[492] Therefore, we allowed station combinations that would not be permitted in larger markets. However, our concern for the economics of broadcast television in small market does not lead us to relax the top four prohibition generally because we concluded that this restriction remains necessary to promote competition in the DVP market Nonetheless, we do recognize that there may be instances where application of this top four restriction will disserve the public interest by preventing marginal -- but not yet "failing" -- stations from effectively serving the needs of their communities. Such stations may not be financially capable of producing the amount of news and local affairs programming that they would like to provide their communities, which in turn may make them less competitive in the local marketplace. Accordingly, in order to effectuate our goals of diversity, localism, and competition, we will consider waivers of the top four-ranked restriction in markets with 11 or fewer television stations. Those are the markets in which we have already recognized that the economics of broadcast television justify relatively greater levels of station consolidation better serve the public interest.

228. In considering waivers of our top four-ranked restriction, we will consider a number of factors. For instance, mergers between stations that reduce a significant competitive disparity between the merging stations and the dominant station in the marketplace are particularly likely to be pro-competitive. Accordingly, waiver applicants should supply television ratings information for the four most recent ratings periods for all local stations so that we may assess the competitive effect of the merger.[493]

229. Second, we also will evaluate the effect of the proposed merger on the stations' ability to complete the transition to digital television Waiver applicants claiming that the merger is needed to facilitate the digital transition should provide data supporting this assertion.

230. We also will consider the effect of the proposed merger on localism and viewpoint diversity. For instance, if both stations do not currently produce a local newscast, the merger is less likely to result in a reduction of viewpoint diversity than if both stations produce news. Similarly, a commitment that the merging parties will significantly increase news and local programming at one or both stations could result in a merger that increases localism and diversity from the status quo. Waiver applicants should submit information about current local news production for all stations in the local market and the effect of the proposed merger on local news and public affairs programming for the affected stations. Applicants stating that the merger is needed to preserve a local newscast should document the financial performance of the affected news division. Applicants for waiver of our top four-ranked restriction must demonstrate that the proposed combination will produce public interest benefits. As in the context of failing station waivers, we will require that, at the end of the merged stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits

[491] *See* ¶¶ 195-200, *supra.*

[492] NAB April 30, 2003 Ex Parte at 2, Chart 1.

[493] *See, e g*, Gray May 29, 2003 Ex Parte

of the merger are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. Finally, our review of waiver requests will account for the diminished reach of UHF stations. As discussed in our national television ownership rule section, UHF stations reach fewer households than VHF stations because of UHF stations' weaker broadcast signals. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Accordingly, we will consider whether one or both stations sought to be merged are UHF stations.

231. As explained above, our revised local TV ownership rule no longer permits combinations involving stations that do not have overlapping Grade B contours, on grounds that, because of statutory mandatory carriage requirements, most stations compete with each other on a DMA-wide basis. However, we recognize that certain stations are not carried throughout their assigned DMAs, and thus do not compete with each other within their assigned markets. Accordingly, we will consider waivers of our local TV ownership rule where a party can demonstrate that the signals of the stations in a proposed combination: (a) do not have overlapping Grade B contours, and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

232. With respect to a licensee's ability to transfer or assign a combination involving a station acquired pursuant to a waiver, we do not find support in the record for permitting such transfers where they do not comply with our rules. The transfer or assignment of such a combination must comply with our rules or waiver standards at the time an application to transfer or assign the station is filed.

c. Satellite Stations

233. Television satellite stations retransmit all or a substantial part of the programming of a commonly owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations.[494] Later, we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks.[495] More recently, we authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[496] In the *Local TV Ownership Report and Order*, we retained our policy of exempting satellite stations from our local ownership rules.[497] We believe that continued exemption of satellite stations from the local TV ownership rule is appropriate. Our satellite station policy rests on such factors as the questionable financial viability of the satellite as a stand-alone facility, and establishment of service to underserved areas. By adding stations to local television markets where stations otherwise would not have been established, the policy advances the same goals as those underlying our local TV ownership restrictions. Since these stations are licensed only if they cannot survive as standalone, independently operated stations, we find that exempting them from the local TV ownership rule will not harm competition or diversity.

---

[494] *See, e g , Authorization of UHF Stations*, 43 F C.C. 2734 (1954).

[495] *See, e g , Meyer Broadcasting Co* , 67 F.C.C.2d 593 (1978), *aff'd mem sub nom Dickinson Broadcasting Corp v FCC*, 593 F 2d 1371 (D C Cir. 1979).

[496] *See Television Satellite Stations, Review of Policies and Rules*, 6 FCC Rcd 4212 (1991).

[497] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12943 ¶ 90.

d. Transferability of Combinations Under Modified Rule

234. If an entity acquires a second or third station that complies with our modified rule, it will not later be required to divest if the number of stations in the market subsequently declines below the level consistent with our outlet cap, or if more than one commonly owned station subsequently becomes a top four-ranked station in the market. The impact of such a "springing" rule would be highly disruptive to the market. Like our other rules, however, we will not ignore the public interest underpinnings at the time of a subsequent sale of the combination. Thus, absent a waiver, a combination may not be assigned or transferred to a new owner if the combination does not satisfy our local TV ownership cap at the time of the proposed assignment or transfer.

B. Local Radio Ownership Rule

235 The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. Until 1992, parties were prohibited from owning two same-service (AM or FM) radio stations whose signal contours overlapped.[498] Although this rule effectively prevented radio station combinations from dominating a local radio market, it also prevented efficient radio station combinations from developing. As a result, in 1992, many radio stations were facing difficult financial conditions.[499] To address this concern, the Commission in 1992 relaxed the local radio ownership rule by establishing numerical limits on radio station ownership based on the total number of commercial radio stations in a market.[500]

236. In the 1996 Act, Congress directed the Commission to revise those limits to provide that: (1) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (2) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (3) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (4) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.[501] Those revisions, along with the simultaneous repeal of national limits on radio station ownership,[502] enabled greater consolidation of radio stations in local and national markets. Currently,

[498] Before 1989, the Commission relied on interference contours to determine whether two commonly owned radio stations implicated the rule. In 1989, the Commission began using principal community contours. In either case, parties could own a single AM-FM combination even if their contours overlapped. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19863-64 ¶¶ 5-7.

[499] *See 1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2757-60 ¶¶ 4-10.

[500] Under the 1992 rules, a party could own 2 AM and 2 FM radio stations in markets with 15 or more commercial radio stations, and three radio stations (of which no more than 2 could be AM or FM stations) in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market. *See* 47 C F.R. § 73.3555(a)(1) (1995)

[501] 1996 Act, § 202(b).

[502] *See id.*, § 202(a).

there are, on average, approximately 10 radio station owners in local markets,[503] and the largest radio station operator, Clear Channel Communications, owns over 1200 radio stations nationwide, representing approximately 10% of the radio stations in the United States.[504] As a result of this consolidation, the radio industry today is on a stronger financial footing than it was a decade ago.[505]

237. The local radio ownership rule has not been altered since the 1996 Act was adopted. In the 1998 biennial review, the Commission concluded that the rule continued to be necessary in the public interest to preserve competition and diversity in local radio markets.[506] The Commission expressed concern, however, that the methodologies used to define radio markets and to count the total number of radio stations and the number of commonly owned radio stations in a radio market were producing irrational and inconsistent results [507] The Commission therefore decided in the first biennial review to initiate a rulemaking proceeding to consider changes to those methodologies.[508] In the 2000 biennial review, the Commission endorsed the conclusions reached in the first biennial review with respect to the local radio ownership rule.[509]

238. As contemplated in the first biennial review, the Commission issued the *Radio Market Definition NPRM* in December 2000 to consider changes to the way we define radio markets and calculate the number of radio stations in a market.[510] In November 2001, the Commission issued the *Local Radio Ownership NPRM*, which initiated a broader inquiry into the effect of consolidation in local radio markets and possible changes to local radio ownership rules and policies to reflect the current radio marketplace [511] These two proceedings (collectively, the "*Radio NPRMs*") are still pending and have been incorporated into this 2002 biennial review proceeding.

239. We conclude that the numerical limits in the local radio ownership rule are "necessary in the public interest" to protect competition in local radio markets. We conclude, however, that the rule in its current form does not promote the public interest as it relates to competition because (1) our current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local radio markets, and (2) the current rule improperly ignores competition from noncommercial radio stations in local radio markets. To address those concerns, we modify the rule to replace the contour-overlap market definition with an Arbitron Metro market and to

[503] *See* MOWG Study No 11, Radio Industry Review 2002. Trends in Ownership, Format, and Finance by George Williams and Scott Roberts (Sept. 2002) at 7 ("MOWG Study No. 11").

[504] *Id* at 4; *see also* http://www.clearchannel.com/radio/

[505] *See* MOWG Study No. 11 at 13-19

[506] *1998 Biennial Review Report,* 15 FCC Rcd at 11090-91 ¶ 59.

[507] *Id* at 11091-94 ¶¶ 61-68

[508] *Id* at 11094 ¶ 68.

[509] *2000 Biennial Regulatory Review,* 16 FCC Rcd 1207, 1218 ¶ 32 (2001), *see also 2000 Biennial Regulatory Review*, Staff Report, 15 FCC Rcd 21084, 21145-46 (2000).

[510] *Definition of Radio Markets, supra* note 8

[511] *Local Radio Ownership NPRM, supra* note 8.

count noncommercial stations in the radio market; and we initiate a new rulemaking proceeding as part of this item to define markets for areas of the country where Arbitron Metros are not defined. Although we primarily rely on competition to justify the rule, we recognize that localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market; our competition-based rule, therefore, will also promote those public interest objectives. We also conclude that, consistent with our focus on competition, joint sales agreements ("JSAs") will result in attribution of the brokered station to the brokering party under certain conditions.

1. Section 202(h) Determination

240. Under Section 202(h), we consider whether the local radio ownership rule continues to be "necessary in the public interest as a result of competition." In determining whether the rule meets that standard, we consider whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity.[512] We examine each of these public interest objectives in turn.

a. *Competition*

241. In the Policy Goals section, we explained how the public interest is served by preserving competition in relevant media markets. Although limits on local radio ownership are generally necessary to serve the public interest, we conclude that the current local radio ownership rule does not serve the public interest as it relates to competition for two reasons. First, the current rule uses a methodology for defining radio markets and counting the number of radio stations in a market that has not protected against undue concentration in local radio markets. Second, the current rule fails to account for the competitive presence of noncommercial stations in a market. We accordingly modify the rule to address these concerns.

(i) Product market definition

242. To measure the state of competition in radio broadcasting, we first must determine the relevant product markets in which radio stations compete and the other media, if any, that compete in those markets.[513] We conclude that radio broadcasters operate in three relevant markets: radio advertising, radio listening, and radio program production.

243. *The Radio Advertising Market.* We conclude that advertisers do not view radio stations, newspapers, and television stations as substitutes.[514] A number of commenters have argued that there is little substitution between advertising on broadcast TV and newspapers. For example, CWA urges the

[512] *Fox Television,* 280 F.3d at 1042.

[513] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand away from the other. *See DOJ/FTC Guidelines*

[514] MOWG Study No 10 at 12; *see also United States v Jacor Communications Inc.*, 1996 WL 784589, *10 (S.D Ohio 1996) (advertisers perceive radio as a distinct advertising medium from television or newspapers); Robert Ekelund, George Ford, and John Jackson, *Is Radio Advertising a Distinct Local Market? An Empirical Analysis*, 14 REV. INDUS. ORG 239 (1999) (radio advertising constitutes a distinct market). By definition, noncommercial radio stations do not compete in the radio advertising market

Commission to adopt local ownership rules that treat TV, newspapers, and radio as separate local product markets.[515] This conclusion is consistent with MOWG Study No.10, which found "weak substitutability" among various local media outlets for purposes of local advertising sales.[516] It is also consistent with antitrust cases filed by the Department of Justice, in which it has alleged that radio advertising constitutes a separate antitrust market.[517] Thus, at least in terms of their revenue generating "customers," radio advertising, newspaper advertising, and television advertising make up distinct product markets.[518]

244. Further, other empirical studies confirm that advertisers do not view ads in newspapers and broadcast radio as substitutes. Authors Alvin Silk, Lisa Klein, and Ernst Berndt (2002) examine advertising substitution among eight media in the national markets.[519] They report only weak substitution between newspapers and other media. Reid and King (2000) conducted a study based on interviewing and surveying advertising managers in national markets and concluded that these managers did not view radio as a good substitute for other media in advertising.[520] The evidence presented in MOWG Study No. 4 also suggests that advertisers do not substitute perfectly between radio and other forms of media.[521] We acknowledge that the studies discussed in this paragraph focus on national advertising markets.[522]

---

[515] CWA Comments at 13-16.

[516] MOWG Study No. 10 at 12. For a technical discussion of MOWG Study No. 10, see Appendix E.

[517] *See, e g*, Complaint ¶¶ 11-14, United States v. Clear Channel Communications, No. 1:00CV02063 (D.D.C. filed Aug 29, 2000); Complaint ¶ 12, United States v. EZ Communications, Inc., No. 1:97CV00406 (D.D.C. filed Feb 27, 1997)

[518] Various commenters have argued that other types of advertising – such as billboards and telephone directories – also are in the same product market with radio advertising. There is, however, no evidence in the record or in the academic literature to support that argument.

[519] Alvin J. Silk, Lisa R. Klein, and Ernst R. Berndt, *Intermedia Substitutability and Market Demand by National Advertisers,* REV INDUS ORG 323-348 (June 2002)

[520] Leonard N. Reid and Karen Whitehill King, *A Demand-Side View of Media Substitutability in National Advertising A Study of Advertiser Opinions about Traditional Media Options*, 77(2) J. MASS. COMM. Q. 292-307 (Summer 2000).

[521] MOWG Study No. 4, Consolidation and Advertising Prices in Local Radio Markets by Keith Brown and George Williams (Sept 2002) ("MOWG Study No 4"). The authors report that increases in concentration in the radio market contributes to a modest increase in radio advertising prices. This evidence of market power suggests that advertising on radio is not a perfect substitute with advertising on other media. Dean Baker, in comments submitted by AFL-CIO, criticizes MOWG Study No 4 for concluding that income growth was the main factor behind the sharp surge in ad prices following the relaxation of radio ownership rules. He argues that misspecification of the model may have led to understating the effects that concentration has on radio advertising prices. We do acknowledge, as Baker argues, that the authors did not include years prior to the 1996 Act that might help establish the relationship between concentration in the radio market and prices in radio advertising. There is, therefore, a possibility that MOWG Study No 4 understates the effect that ownership concentration in local radio markets has on radio advertising prices But any such understatement would only lend further support to our conclusion that radio advertising is a separate product market

[522] *See, e g*, Clear Channel Comments, Statement of Professor Jerry A. Hausman, at 12-17. Hausman also argues that the regressions conducted in MOWG Study No 4 did not include the prices of broadcast television, newspaper, and cable advertising and therefore the coefficients found on the measures of concentration are unreliable, that the result is not robust when other measures of concentration are used, and that the size of the (continued .)

Nothing has been submitted in the record, however, that suggests that local advertisers are better able to substitute between radio and other media than are national advertisers, and the studies' results are consistent with the results of MOWG Study No. 10, which did examine local advertisers.

245. *The Radio Listening Market* We conclude that radio listening is a relevant product market.[523] There is no evidence that radio listeners consider non-audio entertainment alternatives (*e.g.*, reading and watching television) to be good substitutes for listening to the radio. We therefore disagree with commenters that argue that the relevant market should be broadened from radio listening to include non-audio entertainment options.[524] We also disagree with commenters who argue that the relevant product market should be broadened to include other delivered audio media, such as Internet audio streaming and satellite radio.[525] Internet audio streaming may be a substitute for broadcast radio when listening takes place while working on a computer or in a small office environment. A significant portion of audio listening, however, occurs while driving or otherwise outside of the office or home.[526] Since most people do not access Internet audio from a mobile location, we conclude that Internet audio streaming is not a substitute for broadcast radio for a significant portion of audio listening.[527] Similarly, satellite radio may be a substitute for broadcast radio for the fewer than 600,000 people that subscribe to satellite radio.[528] But the vast majority of the population does not subscribe to a satellite radio service [529]

(Continued from previous page)
coefficient that Brown and Williams report does not warrant concern. As to the first point, the staff has found that the results of MOWG Study No. 4 were not significantly changed when the price of broadcast television was added to the regression. We believe, therefore, that the findings presented by MOWG Study No. 4 are robust even if other media are included. As to the remaining two points, the MOWG Study's use of natural logarithms of the HHI is consistent with a widely examined class of economic models, and, although Hausman is correct that the study reports a small coefficient, we believe that a small, statistically significant coefficient is sufficient to support our conclusion of imperfect substitution between radio advertising and other markets.

[523] The relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes'" *United States v E I du Ponte de Nemours & Co*, 351 U S. 377, 395 (1956).

[524] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase" If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment. Gregory J Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www usdoj gov/atr/hmerger/11256.htm (visited Mar 20, 2003). This approach has been referred to as the "smallest market principle."

[525] Murphy Comments in MM Docket No 00-244 at 3; Jimcar Comments in MM Docket No. 00-244 at 1.

[526] *See Arbitron, Radio Today How America Listens to Radio* (2003) at http://www.arbitron.com/downloads/radiotoday03.pdf ("*Radio Today*").

[527] *See* MMTC Comments in MM Docket No. 01-317 at 13-14 n.23 ("availability of the Internet has been overstated"), MMTC Reply Comments in MM Docket No. 01-317 at 31 (Internet radio occupies only about 4% of radio listening at home and work); UCC Comments in MM Docket No. 01-317 at 9 (Internet radio, which requires the use of a computer and modem does not offer the benefit of mobility, and cannot reach the mobile users).

[528] *See supra* ¶ 127 In contrast, local radio stations reach approximately 94% of the U.S. population each week. *See Radio Today*, *supra* note 526 at 3

[529] UCC Comments in MM Docket No 01-317 at 11, MMTC Comments in MM Docket No. 01-317 at 32.

Accordingly, we conclude that satellite radio is not yet a good substitute for broadcast radio for most listeners.

246. Preserving competition for listeners is of paramount concern in our public interest analysis. Although competition in the radio advertising market and the radio program production market indirectly affects listeners by enabling radio broadcasters to compete fairly for advertising revenue and programming – critical inputs to broadcasters' ability to provide service to the public – it is the state of competition in the listening market that most directly affects the public. When that market is competitive, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. Because the additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing listeners,[530] it is critical to our competition policy goals that a sufficient number of rivals are actively engaged in competition for listening audiences. Limits on local radio ownership promote competition in the radio listening market by assuring that numerous rivals are contending for the attention of listeners.

247. *Radio Program Production Market.* Radio stations seek to acquire audio programming from a variety of audio program producers. Many sellers of audio programming do not have adequate substitutes for local radio stations. The record indicates that radio stations are an important mechanism by which the American public is made aware of new music.[531] Moreover, the record suggests no reasonable alternative available to producers of radio talk shows – a type of radio programming that has become increasingly popular in the last decade.[532] To the extent that the radio stations in a local community are owned by one or a few firms, those firms could constitute a bottleneck that would impede the ability of radio programming producers to make their programming available to consumers in that community. Accordingly, we conclude that radio programming constitutes a separate relevant product market.

(ii) Geographic Market Definition

248 Competition analysis requires that we determine the relevant geographic market in which radio stations compete. There is no serious dispute that the relevant geographic market for the product markets in which radio stations compete is local: advertisers and program producers seeking to reach listeners in a local community cannot readily substitute radio stations (or any other media) that do not serve that community for the local radio stations that do. The parameters of the local market, however, have been a source of considerable debate and controversy.[533] We currently use a contour-overlap methodology for defining radio markets and determining the number of radio stations that are in those

[530] For a discussion of program provision under alternative market structures, see, Steiner, *supra* note 403; MOWG Study No 6 at 3-5; and Sinclair Comments, Baumann/ McAnneny Statement at 2-6.

[531] *See* Future of Music Coalition Comments, *Radio Deregulation Has It Served Citizens and Musicians*, at 61-67; AFTRA Comments in MM Docket No. 01-317 at 12-14.

[532] *See* NAB Comments in MM Docket No. 01-317 at 19, NAB Reply Comments in MM Docket No 01-317 at 8-9.

[533] *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

markets.[534] That methodology has been subject to intense criticism for producing unrealistic and irrational results, which in turn led the Commission to issue two separate rulemaking notices – the *Radio NPRMs* – to examine the problems associated with the contour-overlap system in greater detail.

249. We have examined the record developed from the *Radio NPRMs* in conjunction with our overall biennial review of the media ownership rules. Based on the record and our own experience, we now conclude that the contour-overlap system should be replaced by a more rational and coherent methodology based on geographically-determined markets to promote more effectively our competition policy goals.

(a) Problems with the Existing Radio Market Definition and Counting Methodologies

250. We currently rely on the principal community contours of the commercial radio stations that are proposed to be commonly owned to determine the relevant radio market in which those stations participate and to count the other radio stations that are in the market.[535] We first consider whether an area of overlap exists among the principal community contours of all of the stations proposed to be commonly owned. If no such overlap area exists, then the radio stations involved are presumed to be in separate radio markets, and the local radio ownership rule is not triggered. If one or more areas of contour overlap exist, however, the rule is triggered,[536] and we must determine whether the proposed combination complies with the limits specified in the rule.

251. We first ask how many stations a party would own in the relevant radio market (*i.e.*, the "numerator" of the fraction upon which the numerical limits in the local radio ownership rule are based). Under our current methodology, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market. In some instances, a radio station's principal community contour will overlap some, but not all, of the principal community contours of other commonly owned radio stations. In those cases, separate radio markets will be formed from the mutual contour overlaps of different subsets of commonly owned radio stations. We nevertheless apply the same rule: In each of those separate markets, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market.

252. After calculating the numerator for a particular radio market, we next determine the size of the market (*i.e.*, the "denominator" in the fraction). To do this, we again rely on principal community contours. We count as being in the relevant radio market the radio stations that are included in the numerator. We add to this number every other commercial radio stations whose principal community contour overlaps the principal community contour of *at least one* of the stations counted in the numerator. The total represents the size of the market against which the number of commonly owned stations (*i.e.*, the numerator) is evaluated to determine whether the proposed combination complies with

534 See Appendix F for a more detailed explanation of the current contour overlap methodology.

535 The principal community contour for AM stations is the predicted or measured 5 mV/m groundwave contour and for FM stations is the predicted 3.16 mV/m contour 47 C.F.R. § 73.3555(a)(3)(i).

536 A single AM/FM combination is always permitted 47 C.F R. § 73.3555(a)(2) (overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.)

the local radio ownership rule.

253. One significant problem with the current contour-overlap system is what is known as the "Pine Bluff" problem, or the "numerator-denominator" inconsistency.[537] As explained above, a party is deemed to own only those stations that are represented in the numerator, *i.e.*, stations that have mutually overlapping principal community contours. In calculating the denominator, however, any radio station whose principal community contour overlaps the principal community contour of *at least one* of the radio stations in the numerator is counted as being in the market, regardless of who owns that station. As a result, the denominator may include radio stations that are owned by the same party that owns the radio stations represented in the numerator. Because those stations are counted in the denominator, they are by definition "in" the market, but they would not count against the party's ownership limit in that market unless their principal community contours overlap the principal community contours of all of the radio stations in the numerator.

254. The numerator-denominator inconsistency has two potential and interrelated effects that highlight the problems with our current methodology. First, by counting commonly owned stations in the denominator that are not counted in the numerator, a party may be able to use its own radio stations to increase the size of the radio market and thereby "bump" itself into a higher ownership tier. Second (and more commonly), the inconsistency enables a party to own radio stations that are in the relevant radio market (as determined by our rules) without having those stations count against the party's ownership limit in that market.[538] The current system of counting radio stations thus enables a party, by taking advantage of the effects of the numerator-denominator inconsistency, to circumvent our limits on radio station ownership, which are intended to protect against excessive concentration levels in local radio markets.

255. We cannot fix the problems associated with our current methodology merely by excluding commonly owned stations from the denominator or including those stations in the numerator.[539] If we exclude commonly owned stations from the denominator, then we would be determining which radio stations are in the market based on who owns those stations, a distinction that would be both unprincipled and unprecedented in the history of competition analysis. If we include in the numerator commonly owned stations represented in the denominator, a party's ownership level in a particular market may be overly inflated by outlying stations far from the area of concentration.[540] Each of these proposals thus would create new "reverse" anomalies to cancel out the effects of the numerator-denominator inconsistency.

256 Our experience with the current contour-overlap methodology leads us to the conclusion that it is flawed as a means to preserve competition in local radio markets, and that we should take an

[537] *Application of Pine Bluff Radio, Inc (Assignor) and Seark Radio, Inc (Assignee)*, 14 FCC Rcd 6594 (1999).

[538] The first effect arises from *including* commonly owned radio stations in the denominator. The second effect arises from *excluding* those stations from the numerator.

[539] This is one of the options we suggested as a remedy for the "Pine Bluff" problem if we decided to retain a contour-overlap radio market definition. *See Radio Market Definition NPRM*, 15 FCC Rcd at 25077 ¶ 9

[540] *See* Aurora Comments in MM Docket No. 00-244 at 20-22; NAB Comments in MM Docket No. 00-244 at 28.

entirely new approach to market definition.[541] As is clear from our description of the current market definition and counting methodologies, the size of a radio market under our current system is unique to the proposed combination being evaluated. A different combination of radio stations, or the addition or subtraction of a radio station from the combination, has the potential to change the area covered by the principal community contours of the combination and, thus, to change the number of commercial radio stations that are counted as being in the market. This is a singular and unusual method for determining the size of a market. Under traditional antitrust principles, the "relevant geographic market" is used to identify the parties that compete in that market.[542] Our contour-overlap methodology, in contrast, uses the outlets of one party – commonly owned stations with mutually overlapping principal community contours – to define the local radio market and identify other market participants. This is an inherent aspect of the contour-overlap methodology that is not in line with coherent and accepted methods for delineating geographic markets for purposes of competition analysis.

257. The conceptual problems with the contour-overlap methodology have significant implications for our ability to guard against undue concentration in local radio markets. Because radio stations with larger signal contours are more likely to reach a wider audience, consolidation of these radio stations in the hands of one or a few owners increases the potential for market power in local radio markets. Yet the contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets, which make it more likely that a party would be able to acquire additional radio stations in that market.[543] Thus, by creating this perverse incentive, the contour-overlap methodology may undermine the primary public interest rationale for the local radio ownership rule.[544]

---

[541] In light of our analysis, we reject the various proposals that some commenters have advanced to reform the contour-overlap system *See, e.g*, Main Street Comments in MM Docket No. 01-317 at 2 (proposing change to AM propagation standard); Davis Comments in MM Docket No. 01-317 at 3 (proposing change from principal community contour to interference standard)

[542] The DOJ identifies a relevant geographic market as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. *DOJ/FTC Merger Guidelines* § 1 21 This approach is consistent with the Supreme Court's definition of the relevant geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v Grinnell Corp*, 348 U.S. 563, 588-89 (1966).

[543] *See, e g*, Bear Stearns Ex Parte Presentation, *A Defining Moment in Radio?* by Victor B. Miller (May 12, 2003) at 10 ("*Defining Moment in Radio*").

[544] NAB proposes to limit the contour of Class A, AM stations for determining the number of stations that comprise a radio market to a non-directional 5-kilowatt facility (Regional Class B facility). *See* Letter from Jerianne Timmerman, NAB, to Marlene H. Dortch, Secretary, FCC (Jan. 24, 2003) ("NAB Jan. 24, 2003 Ex Parte") Class A stations usually have very large principal community contours, which results in stations being counted in the market that may be very far away from the proposed combination of stations that define the market. Alternatively, NAB proposes to address the "large signal" anomaly by "excluding from the count of stations in a market any station – irrespective of service – whose transmitter site is more than 92 kilometers (58 miles) from the area of common overlap of the stations being acquired." *See* Letter from Edward O. Fritts, NAB, to Michael K. Powell, Chairman, FCC (May 23, 2003) Although either of these approaches could reduce the number of stations counted in a market, the problems with contour-overlap approaches are not limited to situations in which there is a large signal. However, as explained *infra* at ¶¶ 282-286 we adopt NAB's second proposal in the interim modified (continued..)